

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 545

JOSEPH E. SEAGRAM & SONS, INC., ET AL.,  
APPELLANTS,

vs.

DONALD S. HOSTETTER, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

**IN THE SUPREME COURT  
OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

Index No. 6127-64

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JOSEPH E. SEAGRAM & SONS, INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER, INCORPORATED, GOODERHAM & WORTS, LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, MCCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER, INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN, INC., MCKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN-FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWAN DISTILLERY, INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS, INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN &

GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES, INC., UNIVERSAL LIQUOR CORP., Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the STATE LIQUOR AUTHORITY, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

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SUMMONS—October 29, 1964

To the above named Defendants:

You are hereby Summoned to answer the complaint in this action and to serve a copy of your answer on the Plaintiffs' Attorneys within 20 days after the service of this summons, exclusive of the day of service; and in case [fol. 2] of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York, October 29, 1964.

Lord, Day & Lord, Attorneys for Plaintiffs, Office  
and Post Office Address: 25 Broadway, Borough  
of Manhattan, City of New York 10004.

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

COMPLAINT

Plaintiffs, complaining of defendants by Lord, Day & Lord, their attorneys, allege:

For a Separate and Distinct First Cause of Action:

1. Joseph E. Seagram & Sons Inc. is a foreign corporation organized and existing under the laws of the State of Indiana, duly qualified to do business in the State of New York.

2. The House of Seagram, Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

[fol. 3] 3. Stitzel-Weller Distillery is a foreign corporation organized and existing under the laws of the State of Kentucky.

4. The Paddington Corporation is a domestic corporation organized and existing under the laws of the State of New York.

5. Hiram Walker Incorporated is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

6. Gooderham & Worts Limited is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

7. Jas. Barclay & Co., Limited is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

8. W. A. Taylor & Company is a domestic corporation organized and existing under the laws of the State of New York.

9. The American Distilling Company is a foreign corporation organized and existing under the laws of the State of Maryland, duly qualified to do business in the State of New York.

10. McCormick Distilling Company is a foreign corporation organized and existing under the laws of the State of Missouri.

11. The Fleischmann Distilling Corporation is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 4] 12. Mr. Boston Distiller Inc. is a foreign corporation organized and existing under the laws of the State of Massachusetts, duly qualified to do business in the State of New York.

13. The Viking Distillery, Inc. is a foreign corporation organized and existing under the laws of the State of Georgia.

14. James B. Beam Distilling Company is a foreign corporation organized and existing under the laws of the State of Illinois.

15. James B. Beam Import Corporation is a domestic corporation organized and existing under the laws of the State of New York.

16. Schenley Industries Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

17. Affiliated Distillers Brands Corp. is a domestic corporation organized and existing under the laws of the State of New York.

18. Knickerbocker Liquors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

19. Barton Distilling Company is a foreign corporation organized and existing under the laws of the State of Delaware.

20. Barton Distillers Import Corporation is a domestic corporation organized and existing under the laws of the State of New York.

21. Julius Wile Sons & Company, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 5] 22. Bacardi Imports, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

23. Austin Nichols & Company, Inc. is a foreign corporation organized and existing under the laws of the State of Virginia, duly qualified to do business in the State of New York.

24. Canada Dry Corporation is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

25. Heublein Inc. is a foreign corporation organized and existing under the laws of the State of Connecticut, duly qualified to do business in the State of New York.

26. McKesson & Robbins, Inc. is a foreign corporation organized and existing under the laws of the State of Maryland, duly qualified to do business in the State of New York.

27. National Distillers and Chemical Corporation is a foreign corporation organized and existing under the laws of the State of Virginia, duly qualified to do business in the State of New York.

28. Publicker Distillers Products, Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

29. Brown-Forman Distillers Corporation is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

30. Glenmore Distilleries Company is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

[fol. 6] 31. A. Smith Bowman Distillery Inc. is a foreign corporation organized and existing under the laws of the State of Virginia.

32. "21" Brands Inc. is a domestic corporation organized and existing under the laws of the State of New York.

33. Star Hill Distilling Company is a foreign corporation organized and existing under the laws of the State of Kentucky, duly qualified to do business in the State of New York.

34. Schieffelin & Company is a domestic corporation organized and existing under the laws of the State of New York.

35. Defendants Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom and Robert E. Doyle are commissioners of the State Liquor Authority duly appointed by the Governor of the State of New York charged with the responsibility of administering the Alcoholic Beverage Control Law including the implementation of said Alcoholic Beverage Control Law by the promulgation of rules and regulations for the purpose of effecting said law.

36. Defendant Louis J. Lefkowitz is the Attorney General of the State of New York, the Chief Legal Officer of

the State of New York, and as such is charged with the enforcement of the provisions of the Alcoholic Beverage Control Law.

37. The above-listed plaintiffs are distillers, importers, or wholesalers designated as agents of distillers of liquor which is sold in New York.

38. In an extraordinary session, the Legislature of the State of New York enacted Chapter 531 of the Laws of 1964 by which it amended the Alcoholic Beverage Control Law in several respects. (A copy of Chapter 531 here-[fol. 7] inafter called "The New Act" is attached hereto as Exhibit "A". Section references herein are to sections of Chapter 531. Subdivision and paragraph references bear identifying labels accorded them as they will appear in Section 101-b of the Alcoholic Beverage Control Law as that law has been amended by Chapter 531, but are described herein as if subdivisions of the sections of Chapter 531 in order to facilitate reference to Exhibit "A").

39. Section 101 b-3 of the Alcoholic Beverage Control Law, as amended by The New Act, requires that for all brands of liquor or wine sold to or purchased by a wholesaler in New York, there must be filed with the State Liquor Authority by:

"(1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose."

schedules of prices to wholesalers for such brands. The Alcoholic Beverage Control Law fails to provide an exact definition of "the owner of such brand". Section 101-b of the Alcoholic Beverage Control Law further requires that for all brands of liquor or wine sold to or purchased by re-

tailers in New York State, a schedule of prices for such brands must be filed with the State Liquor Authority by "each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers". Each schedule must be filed on or before the tenth day of each month (see paragraph 4 of Section 7 of The New Act). The prices and discounts set forth in such schedules become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month.

[fol. 8] 40. The New Act in Section 9 (Exhibit "A", pp. 8-10) significantly expands upon the former requirements of Section 101-b, subdivision 3, pertaining to the filing of price schedules, by adding eight entirely new paragraphs (paragraphs (d) through (k)) to that subdivision.

41. Paragraph (d) of Section 9 of The New Act (Exhibit "A", p. 8) requires that a brand owner or wholesaler designated as agent must file an "affirmation" verified by the brand owner or wholesaler designated as agent, that the price listed on the schedule of prices to wholesalers (at which liquor is sold to New York wholesalers) is no higher than the lowest price at which the same item of liquor was sold by them or by any "related person" to any wholesaler, anywhere in any other state of the United States or in the District of Columbia during the preceding calendar month.

42. Paragraph (f) of Section 9 of The New Act (Exhibit "A", p. 9) incorporates an affirmation requirement similar to that found in paragraph (d), in requiring from a brand owner or a wholesaler designated as agent, an affirmation verified by the brand owner or wholesaler designated as agent that the price at which liquor is sold by a brand owner, wholesaler designated as agent, or a "related person" to retailers in New York State is no higher than the price at which the same item of liquor was sold to retailers in any other state of the United States (other



than "monopoly states", states which themselves or through state agencies own and operate retail liquor stores) or in the District of Columbia during the preceding calendar month. Paragraph (f) does not specify who is to file the affirmation.

43. "Related person" is defined in paragraphs (d) and (f) of Section 9 of The New Act as:

"any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors of officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands."

44. Paragraph (e) of Section 9 of The New Act (Exhibit "A", p. 8) imposes an affirmation filing requirement similar to that found in paragraph (d) but applies it to the filing of "any other schedule" of prices to wholesalers. Here the affirmation must be made and verified by the person filing the schedule. Paragraph (e) requires that the person filing "any other schedule" has not sold at a lower price in any other state. It does not contain any provisions relative to sales by "related persons".

45. Paragraph (g) of Section 9 of The New Act (Exhibit "A", p. 9) follows the form of paragraph (e) in requiring that an affirmation must accompany "any other schedule" of prices to retailers. The affirmation must be made and verified by the person filing the schedule.

46. As paragraphs (e) and (g) are interpreted by State Liquor Authority Rule 16, §65.7 as amended effective October 31, 1964, such paragraphs apply only to schedules of prices for sales to wholesalers and retailers where the sales are made by persons who are not "related persons"

as that term is defined by paragraphs (d) and (f) of Section 9 of The New Act.

47. Paragraph (i) of Section 9 of The New Act (Exhibit "A", pp. 9-10) requires that in determining what is the lowest price at which an item of liquor was sold in another state, appropriate reductions must be made to include all discounts, rebates, free goods, allowances and [fol. 10] other inducements of any kind whatsoever offered or given to wholesalers or retailers in such other state. However, in computing the lowest price, reductions need not be made where price differentials make only due allowance for differences in state gallonage taxes or differentials in the actual cost of delivery.

48. The New Act does not include vintners and wholesalers of wine as persons required to file affirmations and verifications in accordance with the provisions of paragraphs (d) through (g) of Section 9 of The New Act.

49. Paragraph 3(c) of Section 7 of The New Act (Exhibit "A", p. 6) exempts from the filing and affirmation requirements described above a brand of liquor which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer. Such brands are hereinafter referred to as "private labels".

50. Paragraph (j) of Section 9 of The New Act (Exhibit "A", p. 10) makes it a misdemeanor for any person to make a false statement in any affirmation filed pursuant to the Act. Upon conviction a person may be fined up to \$10,000 and imprisoned for up to a period of six months.

51. Paragraph 6 of Section 7 of The New Act grants to the State Liquor Authority the power to cancel, suspend or revoke a license for failure to comply in any manner with any of the provisions of Section 101-b as amended by The New Act. The Authority is also permitted by paragraph (k) of Section 9 of The New Act to refuse to accept, for a period not exceeding three calendar months, any af-

firmation required to be filed by a person who has been convicted of making a false statement in any affirmation.

52. Paragraph (h) of Section 9 of The New Act (Exhibit "A", p. 9) prohibits sales in New York of any brands for which an affirmation has not been filed.

[fol. 11] 53. Section 9 of The New Act violates the Articles of the Constitution of the State of New York, and the Articles of the Constitution of the United States, by depriving plaintiffs of liberty and property without due process of law in that:

(a) Distillers and wholesalers will be severely injured by being compelled to sell in New York State at artificial prices, irrespective of marketing conditions, net profit margins, cost of doing business in New York as compared to other states, and other factors which distinguish New York from other markets;

(b) In attempting compliance with the requirements of Section 9 of The New Act, plaintiffs will be compelled to reorganize completely their sales methods and accounting procedures, and/or institute entirely new communication and price recording machinery;

(c) The affirmation and verification provisions of Section 9 of The New Act, enforced conjunctly with various price posting requirements in other states, may operate to permanently prevent distillers and wholesalers designated as agents from at any time in the future increasing the price of brands sold by them to the New York wholesalers and in any event will unjustifiably accord New York purchasers the benefit of lower prices for two or more months after a price increase has become effective in other states. These unreasonable results will be effected even though, due to increased costs or other factors, there may be a perfectly justifiable reason to increase the price;

(d) Persons who satisfy the definition of "related person" described in paragraphs (d) and (f) of Section 9 of The New Act would be disabled from competing with local

wholesalers in states other than New York and disabled from competing with distillers and importers who sell brands not sold in New York State. Non-related local wholesalers in states other than New York could for any [fol. 12] competitive reason conduct special local discount sales campaigns and grant allowances and inducements without fear that such campaigns might drive down the price at which the same brand is sold to retailers in New York State. Distillers and importers selling brands not sold in New York could, as to those "non-New York brands", compete with complete freedom in a non-New York market. A distiller or importer in that same market who sells competitive brands which are also sold in New York would have to consider the effect upon his New York price before responding to competitive pressures in the non-New York market. The effect of The New Act upon distillers, importers and wholesalers outside New York who nevertheless qualify as "related persons" will be to destroy or severely hamper their competitive position in their own local markets even though they may be completely remote from New York State.

54. Section 9 of The New Act is an arbitrary, capricious and unreasonable exercise of the state's police power for the following reasons:

(a) The term "related person" found in paragraphs (d) and (f) of Section 9 of The New Act (Exhibit "A", pp. 8, 9) is so vague that distillers, importers and wholesalers designated as agents are unable to determine what persons both within and without New York State satisfy this definition and therefore must be taken into account in furnishing the affirmations required by The New Act:

(b) Even if distillers, importers and wholesalers designated as agents could determine who is a "related person" they would have no power to compel such "related person" to furnish them with information as to the prices at which they sell their products in states other than New York;

[fol. 13] (c) Paragraph (i) of Section 9 of The New Act (Exhibit "A", pp. 9, 10) unreasonably limits price differentials to state "gallongage" taxes or fees. It does not include differentials for taxes imposed on a "per case basis". Nor does it permit differentials based upon a state sales or gross receipts tax;

(d) It is impossible for many distillers, importers and wholesalers designated as agents to determine the prices in any given month at which brands sold by them in New York are sold to wholesalers throughout the United States and the District of Columbia;

(e) It is impossible for distillers, importers, wholesalers designated as agents, or "related persons" to determine the prices at which brands sold by them in New York are sold to retailers throughout the United States and the District of Columbia;

(f) It is impossible for distillers, wholesalers designated as agents, or "related persons" to determine what is meant by "rebates, free goods, allowances and inducements of any kind whatsoever" so as to be able to make appropriate reductions in computing the lowest price for such items as required by paragraph (i) of Section 9 of The New Act.

55. Section 9 of The New Act is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in Sections 2 and 101 b-1 of that Law (repeated again in Section 7 of Chapter 531, Exhibit "A", p. 5), which Sections declare it to be the policy of the State in enacting such Law to promote temperance in the consumption of alcoholic beverages. Section 2 of the Alcoholic Beverage Control Law further states that these provisions of the Law are enacted for the protection, health, welfare and safety of the people of the state. The setting of maximum prices bears no relationship to this purpose.

[fol. 14] 56. Section 9 of The New Act will not serve to cure the possibility of monopolistic and anti-competitive

practices (Exhibit "A", Section 8, p. 8) at which The New Act is directed.

57. Section 9 of The New Act contravenes the terms and policy of the Sherman Act, 15 U. S. C. §1-7.

58. Section 9 of The New Act is in direct conflict with the Robinson-Patman Act, 15 U. S. C. §13a, §13b, §21a, in that:

(a) Section 9 establishes price controls upon distillers, importers and wholesalers designated as agents whether or not their pricing policies tend to lessen competition, whereas the Robinson-Patman Act would permit such price controls *only* where, without such controls, competition among distillers, importers and wholesalers designated as agents would be lessened;

(b) Section 9 of The New Act fails to permit price differentials permitted by the Robinson-Patman Act, such as an adjustment of price to meet competition and an adjustment of price where there is sufficient cost justification for such a price;

(c) Section 9 would force distillers, importers and wholesalers designated as agents, in violation of the Robinson-Patman Act, to give discounts to purchasers in New York State although there would be no cost justification for such discounts and although such discounts would not be necessary to meet competition.

59. For the reasons described in paragraphs 57 and 58 above, Section 9 of The New Act directly conflicts with Federal Antitrust Laws and therefore must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

[fol. 15] 60. Section 9 of The New Act violates the Articles of the Constitution of the United States by interfering with commerce among the states in that:

(a) The only practical way by which distillers, importers and wholesalers designated as agents can gather and

insure the reliability of information necessary to make the affirmations, is to establish and to control the price at which their brands are sold in all other states. This the plaintiffs could not do for in many states they would be violating the laws of those states and in any event they would be violating federal antitrust laws;

(b) Section 9 of The New Act is extraterritorial in its effect in regulating contracts which are made and are to be executed wholly beyond the boundaries of New York State;

(c) Section 9 of The New Act attempts to bestow an economic advantage upon the citizens of the State of New York at the expense of out-of-state vendors of liquor;

(d) As described in paragraph 53(c) of this complaint, distillers, importers and wholesalers designated as agents may be unable at any time to increase the price at which they sell their brands in New York State and in any event will be compelled to accord New York purchasers the pre-existing lower prices for a period of two or more months after a general price increase goes into effect.

61. Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States by discriminatorily imposing maximum price limitations upon sales made by distillers, importers and wholesalers dealing in national brands of liquor, while failing to impose such limitations upon:

[fol. 16] (a) sales made by persons dealing in liquor sold under "private labels";

(b) sales made by vintners and wholesalers of wine.

62. Paragraph 3.(a) of Section 7 of The New Act requires that no brand of liquor shall be sold to or purchased by a wholesaler irrespective of the place of sale or delivery unless a schedule as provided in that section is filed with the State Liquor Authority and is then in



effect. Such schedule must contain, among other things, "the net bottle and case price paid by the seller".

63. Paragraph 3.(a) of Section 7 of The New Act (Exhibit "A", p. 6) violates the Articles of the Constitution of the United States in that:

(a) By requiring schedules for sales "irrespective of the place of sale or delivery", paragraph 3.(a) interferes with commerce among the states and interferes with foreign commerce by requiring schedules to be filed in New York State by distillers, importers and wholesalers designated as agents as to the prices at which they sell brands in any other state whether or not such distiller also sells such brands in New York;

(b) By requiring schedules to contain the "net bottle and case price paid by the seller", paragraph labeled 3.(a) deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power. This requirement of paragraph 3.(a) in no way serves to carry out the policy of the Alcoholic Beverage Control Law as expressed in Section 2 of that Law.

**For a Separate and Distinct Second Cause of Action:**

64. Alpine Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 17] 65. Ben Perlow Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

66. Bison Liquor Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

67. Blue Crest Wine and Spirit Corp. is a domestic corporation organized and existing under the laws of the State of New York.



68. Bonny Distributing Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

69. Capital Distributors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

70. Cardinal Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

71. Colony Liquor Distributors, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

72. Distilled Brands Inc. is a domestic corporation organized and existing under the laws of the State of New York.

73. Eber Bros. Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

74. Elmira Tobacco Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

75. Empire Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 18] 76. Graves & Rodgers, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

77. M. Lichtman & Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

78. Major Liquor Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

79. Monarch Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

80. Mullen & Gunn, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

81. Peerless Importers Corp. is a domestic corporation organized and existing under the laws of the State of New York.

82. Ramapo Wine & Liquor Corporation is a domestic corporation organized and existing under the laws of the State of New York.

83. Rodgers Liquor Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

84. S & K Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

85. Standard Food Products Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 19] 86. Standard Wine & Liquor Co. Inc. is a domestic corporation organized and existing under the laws of the State of New York.

87. Star Industries Inc. is a domestic corporation organized and existing under the laws of the State of New York.

88. Universal Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

89. The above plaintiffs listed in paragraphs 64 through 88 are wholesalers selling liquor to retailers within New York State and may be held to satisfy the definition of "related persons" in paragraph (f) of The New Act.

90. Plaintiff New York wholesalers reallege each and every allegation contained in paragraphs numbered 35, 36, 38 through 52, 53(a) (b), 54(a) (c), 55, 56, 57, 58(a) (b), 59 and 61 of this complaint with the same force and effect as if fully set forth herein.

91. Paragraph (f) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in depriving New York wholesalers of liberty and property without due process of law in that New York wholesalers who may be "related persons" will be severely injured by being compelled to sell to retailers at artificial prices, irrespective of marketing conditions, net profit margins, and other factors which distinguish New York from other markets. In this respect the statute would vest complete control of New York wholesalers' prices in the hands of any one of thousands of wholesalers throughout the United States.

92. Section 65.7 of Rule 16 of the State Liquor Authority Rules and Regulations, as amended effective October 31, 1964, interprets paragraph (f) of Section 9 of The New [fol. 20] Act as requiring the filing of affirmations of the "wholesaler to retailer" price only as to sales by those New York wholesalers who satisfy the definition of "related persons" found in paragraph (f).

93. As Section 65.7 of State Liquor Authority Rule 16 interprets The New Act, New York wholesalers will not themselves be required to file affirmations, but if they qualify as "related persons" will be prohibited from selling brands in New York State until the brand owner or agent has filed an affirmation and furnished them with a copy of his affirmation.

94. Paragraph (f) of Section 9 of The New Act, for the following reasons, is an arbitrary, capricious and unreasonable exercise of the state's police power:

(a) Paragraph (f) of Section 9 of The New Act, and particularly the regulations of the State Liquor Authority interpreting how that paragraph is to be applied, make a New York wholesaler's right to sell at any price he chooses in New York State dependent upon whether or not he has satisfied the definition of "related person". If he is a "related person", he will be prohibited from selling until an affirmation has been filed by the brand owner or wholesaler designated as agent.

(b) The definition of "related person" in paragraph (f) of Section 9 of The New Act is so vague that New York wholesalers are unable to determine if they are "related persons" within the meaning of The New Act.

(c) New York wholesalers have no power to compel brand owners or wholesalers designated as agents to file the required affirmations. If a New York wholesaler is a "related person" and affirmations pertaining to some brands are not filed, he will be prohibited from selling those brands during the period for which such affirmation would have been in effect.

[fol. 21] (d) With insufficient guidance from the definition of "related person" found in paragraph (f) of Section 9 of The New Act, New York wholesalers are nevertheless compelled to determine whether or not they are "related persons".

95. A New York wholesaler who is considered to be a "related person", as a practical matter, must insure that the price at which he sells an item of liquor to retailers is no higher than the price at which a person related to the brand owner or a wholesaler designated as agent is selling such item of liquor to retailers in other states. This will require consultation between the brand owner or wholesaler designated as agent on the one hand and the wholesaler who is a "related person" on the other to make the affirmation required by paragraph (f) of Section 9 of The New Act which is likely to cause unwitting violations of

the laws of New York and of other states and of the federal antitrust laws.

96. Paragraph (g) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it is so vague and indefinite that plaintiff New York wholesalers cannot know whether or not they are required to file affirmations as required by that paragraph.

97. State Liquor Authority Rule 16, §65.7, as amended effective October 31, 1964, requires only persons who are not "related persons", as that term is defined in paragraph (f) of Section 9 of The New Act, to file affirmations pursuant to paragraph (g). Rule 16 also requires that a "representation" must be given by a person filing an affirmation pursuant to paragraph (g) that he is not a "related person".

98. If the State Liquor Authority's interpretation of paragraph (g) of Section 9 of The New Act is correct, a [fol. 22] person signing an affirmation pursuant to paragraph (g) may be criminally prosecuted if he innocently misdefines his company as not being a "related person".

#### For a Separate and Distinct Third Cause of Action:

99. Hiram Walker Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

100. Julius Wile Sons & Company, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

101. The Paddington Corporation is a domestic corporation organized and existing under the laws of the State of New York.

102. National Distillers and Chemical Corporation is a foreign corporation organized and existing under the laws

of the State of Virginia, duly qualified to do business in the State of New York.

103. Knickerbocker Liquors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

104. Wayne Liquor Corp. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

105. Plaintiffs listed in paragraphs 99, 100, 101, 102, 103 and 104 are persons selling directly to retailers within New York State in whom a brand owner or wholesaler designated as agent has an interest, direct or indirect. These plaintiffs, therefore, are "related persons" within the definition supplied by paragraph (f) of Section 9 of The New Act.

[fol. 23] 106. Plaintiff "related person" New York wholesalers reallege each and every allegation contained in paragraphs of this complaint numbered 35, 36, 38 through 52, 53(a)(b), 54(a)(c), 55, 56, 57, 58(a)(b), 59, 61, 91, 92, 93 and 94(a), with the same force and effect as if fully set forth herein.

107. Paragraph (f) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it deprives the above-described plaintiffs of equal protection of the laws by imposing maximum price limitation upon sales of certain brands by these "related person" New York wholesalers while failing to impose similar restrictions upon sales of the same brands by "non-related person" New York wholesalers.

For a Separate and Distinct Fourth Cause of Action:

108. The American Distilling Company, Austin Nichols & Company, Inc., Bacardi Imports, Inc., Barton Distilling

Company, Brown-Forman Distillers Corporation, Canada Dry Corporation, The Fleischmann Distilling Corporation, Glenmore Distilleries Company, James B. Beam Distilling Company, McCormick Distilling Company, Mr. Boston Distiller, Inc., National Distillers and Chemical Corporation, Schenley Industries, Inc., Joseph E. Seagram & Sons, Inc., Star Hill Distilling Company, Stitzel-Weller Distillery, Inc., W. A. Taylor & Company and "21" Brands, Inc., are persons who manufacture and bottle liquor, rectify and bottle liquor, or import liquor in bulk from foreign sources and bottle it domestically.

109. Plaintiffs listed in paragraph 108 above reallege each and every allegation contained in paragraphs numbered 1, 2, 3, 4, 6, 7, 8, 13, 14, 16, 19, 21, 22, 23, 26, 28, 31 through 52 of this complaint with the same force and effect as if fully set forth herein.

[fol. 24] 110. Paragraph 3(a) of Section 7 of The New Act requires that no brand of liquor shall be sold to or purchased by a wholesaler unless a schedule as provided in that section is filed with the State Liquor Authority and is then in effect. Such schedule must contain among other things "the net bottle and case price paid by the seller".

111. Paragraph 3(a) of Section 7 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it arbitrarily, capriciously and unreasonably requires manufacturers and bottlers of liquor as well as importers of liquor in bulk to file a bottle and case price at which they purchased such liquor, when in fact no such price exists and compliance is therefore impossible.

112. Rule 16, §65.69, of the State Liquor Authority Rules and Regulations, as amended effective October 31, 1964, attempts in part to cure the above defect by excluding manufacturers from those required to furnish the "net bottle and case price paid by the seller".



113. The State Liquor Authority has no legislative authority to cure the defect of paragraph 3.(a) of Section 7 of The New Act. Manufacturers of liquor and importers of liquor in bulk may nevertheless be bound by the plain language of the requirement of paragraph 3.(a) even though compliance by them will be impossible.

114. If the plaintiffs described above fail to furnish their non-existent "net bottle and case price paid by the seller" for brands which they manufacture or import in bulk, they will be prohibited by paragraph 3.(a) from selling those brands in New York State.

Wherefore, plaintiffs state that they have no adequate remedy at law, and demand judgment against the defendants:

[fol. 25] (a) Decreeing and declaring that the provisions of Section 9 New York Session Laws, 1964, Ch. 531, are unconstitutional and void.

(b) Decreeing and declaring that that part of paragraph 3.(a) of Section 7 New York Session Laws, 1964, Ch. 531, requiring that the schedules of prices to wholesalers contain the "net bottle and case price paid by the seller", is unconstitutional and void.

(c) Decreeing and declaring that that part of paragraph 3 (a) of Section 7 New York Session Laws, 1964, Ch. 531, requiring that "No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed" is unconstitutional and void insofar as it may require schedules of prices of sales to wholesalers in other states than New York.

(d) Enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by Section 9 of Chapter 531 of the Laws of 1964.



(e) Enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to file the "net bottle and case price paid by the seller" and for failure to file schedules of prices of sales to wholesalers in states other than New York as required by Section 7 New York Session Laws, 1964, Ch. 531.

[fol. 26] (f) Granting such other and further relief as may be just and proper, together with the costs of this action.

Lord, Day & Lord, Attorneys for Plaintiffs.

(Verified by Frederick J. Lind, Charles Guttman and George Goldstein, October 27 and 28, 1964.)

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[fol. 27]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

At Chambers

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Court House, Albany, New York, on the 29 day of October, 1964.

Present: Hon.

Justice.

ORDER TO SHOW CAUSE

Upon reading and filing the annexed affidavit of Thomas F. Daly, duly sworn to on the 28th day of October, 1964 and the annexed affidavits of Frederick J. Lind, R. R. Herrmann, Jr., Joseph D. Cotler, D. L. Street, Raymond Revit, Walter J. Devlin, Ira R. Schattman, Jr., Frank T. Hypps, Jack Goodman, Jack W. Marer, Chester F. McNamara, and Charles W. Sand all duly sworn to and copies of the summons and complaint hereto attached, let the defend-

ants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz, show cause before one of the justices of this Court, at a Special Term of this Court, held in and for the County of Albany, at the Court House, Albany, New York, on the 13th day of November, 1964, at the opening of court on that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein restraining the defendants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz, pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of Section 9, New York Session Laws, 1964, Ch. 531;

[fol. 28] 2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by Section 7, New York Session Laws, 1964, Ch. 531.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to Section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by the seller" as required by Section 7, New York Session Laws, 1964, Ch. 531; and it is further

Ordered, that in the meantime and until the hearing and determination of this motion and the entry of an order thereon, the defendants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz be and they are hereby stayed, enjoined and restrained from:

1. Requiring plaintiffs to comply in any manner with any part of Section 9, New York Session Laws, 1964, Ch. 531.

2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by Section 7, New York Session Laws, 1964, Ch. 531.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to Section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by the seller" as required by Section 7, New York Session Laws, 1964, Ch. 531.

[fol. 29] Sufficient reason appearing therefor, let service of a copy of this order and the papers upon which it is based upon the defendants on or before October 30, 1964, at 4 P.M. be deemed good and sufficient service thereof.

Enter

Russell G. Hunt, J. S. C.

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF THOMAS F. DALY, READ IN SUPPORT OF MOTION  
State of New York,  
County of New York, ss.:

Thomas F. Daly, being duly sworn, deposes and says:

1. I am a member of the firm of Lord, Day & Lord, attorneys for the plaintiffs in the action and am fully familiar with all the facts and circumstances involved in this proceeding.

2. I make this affidavit in support of an application for a preliminary injunction and for a temporary restraining order pending the hearing and determination of the motion for a temporary injunction.

3. The action seeks to have certain parts of Section 7 and the entirety of Section 9 of Chapter 531 of the Laws of 1964 declared unconstitutional as being violative of the commerce and supremacy clauses of the Constitution of [fol. 30] the United States and violative of the due process and equal protection clauses of the Constitution of the State of New York and the United States.

4. Subdivisions 3(a) and (b) of Section 101-b of the Alcoholic Beverage Control Law as amended by Section 7 of Chapter 531 provide for the filing of price schedules with the State Liquor Authority of all brands sold in New York to wholesalers or retailers.

5. Subdivisions (d) and (f) of Section 9 of Chapter 531 provide that for each brand of liquor sold in New York, the owner of such brand or the wholesaler designated as agent must, in addition to the aforesaid price schedules, also file a verified affirmation that the "bottle and case price of liquor to wholesalers" (or retailers) "is no higher than the lowest price at which such item of liquor was sold by such brand owner, such wholesaler designated as agent or any related person to any wholesaler" (or retailer) "anywhere in any other state of the United States or the District of Columbia \* \* \*."

6. Subdivision (i) of Section 9 of Chapter 531 says that "in determining the lowest price \* \* \* appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler \* \* \* or retailer \* \* \*."

7. Subdivision (d) of Section 9 of Chapter 531 defines "a related person" as "any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial

business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated [fol. 31] as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands."

8. These provisions of Chapter 531 become effective on October 31, 1964. The State Liquor Authority in implementing the law has recently promulgated, among others, Rule 16 as amended, which likewise becomes effective on October 31, 1964. It requires a brand owner, or its designated wholesale agent, to file the aforesaid duly verified affirmation by December 1, 1964, showing the lowest price at which a brand included in the schedule filed pursuant to subdivisions 3(a) and (b) of Section 101-b was sold in any other state or in the District of Columbia during November 1964.

9. As appears from the moving affidavits, if its operation is not enjoined pending the testing of its constitutionality, the law as implemented by the regulations will require brand owners, importers and wholesalers who are designated as agents of brand owners, in many instances to reorganize entirely their sales and accounting staffs, to establish price reporting procedures which must be able to report accurately every price charged for each brand of liquor during a monthly period, and to install or attempt to install various other procedures in an effort to ascertain the lowest price at which their brands were sold at any time anywhere in the United States or the District of Columbia during the month of November. These procedures will not only be disruptive of the internal structures of many plaintiffs during the month of November, which is the start of the high sales Christmas period, but it will also involve considerable monetary expense in its initiation. Because of the serious doubts as to the constitutionality of Section 9 of Chapter 531, plaintiffs should not be forced to bear this expense and organizational disruption.

[fol. 32] 10. In addition to being forced to enact severe internal changes in November 1964, those plaintiffs who

must file price affirmations on December 1, 1964 will be required to institute a completely new system of price reporting which will involve an unknown number of wholesalers throughout the United States. These "related person" wholesalers must be contacted and asked to report to the plaintiffs concerned the lowest price at which they sold each of the brands of a particular distiller during the month of November. The expense to plaintiffs in installing this totally new system will be considerable, but they also face injury in the form of loss of good will of independent wholesalers who, for their own business reasons, do not wish to divulge such information to plaintiffs.

11. As the moving affidavits submitted herein show, the term "related persons" as defined in Chapter 531 is exceedingly vague and none of the plaintiffs knows to whom it will apply. Because of this there is a complete lack of knowledge as to whether or not verified affirmations required by the Act should be filed with respect to sales that are made throughout the country to a great number of wholesalers and retailers.

12. So too, as pointed out in the moving affidavits, a "related person" may and probably in most cases will be completely independent of the wholesaler or the brand owner, neither one of whom will be in a position to compel, short of applying sanctions which would be prohibited by Federal antitrust legislation, such "related persons" to disclose to them the lowest price at which he has sold their brands during a particular month.

13. It will also, in many instances be impossible to ascertain the lowest price at which a particular brand is sold in any month because of the vagueness that results from the language of the statute concerning how the lowest price for any given brand is to be determined. For instance, [fol. 33] the phrase "other inducements of any kind whatsoever" is, as pointed out in the moving affidavits, completely meaningless in assisting a brand owner or a wholesaler designated as agent to arrive at a determination of the

price at which a particular brand is sold in any particular month. There are many practices which are not considered by the industry to be inducements but rather general advertising and promotional expense which the State Liquor Authority might say are inducements given and thus must be reflected in the price. As also pointed out in the moving affidavits, many of these promotions run for more than a month so that even if their cost was to be charged against a brand it would not be known until sometime after the affirmation had to be made what the actual charge against that brand should have been. For the many reasons set forth in the papers herein, it is extremely doubtful whether anyone will be able to devise any system which could be relied upon by November 1, 1964 or later to tell the person required to verify the affirmation that the information contained upon which he is relying is accurate and that the price quoted is, in fact, the lowest price at which the brand referred to was sold during the previous month.

14. As can readily be appreciated, the changes, the work, the studies and the other moves that will be required in an attempt to establish the price at which liquor was sold throughout this country will be extensive, arduous and, in many instances, futile ones. Furthermore, the gathering of price information by plaintiffs in order to ascertain their New York prices calls for private conduct which the Sherman Act forbids.

15. Accordingly, no matter how extensive or expensive the efforts of the people concerned may be, it is problematical whether the information thus obtained will be reliable. As a result, they will be faced with the choice [fol. 34] of not selling their brands in New York or of asking one of their officials to make a verified affirmation knowing that he may be asked to verify unreliable or untrustworthy facts, thus individually incurring criminal sanctions while his company may suffer the other penalties imposed by law (see: Alcoholic Beverage Control Law, Section 101-b-6; subdivisions [h] and [j] of Section 9 of Chapter 531).



16. Prior to the enactment of Chapter 531, the liquor industry in the State of New York was the subject of a Moreland Act Commission study. The aforesaid provisions of Section 9 of Chapter 531 of the Laws of 1964, to the constitutionality of which objections are being made in this action, were contained in Senate Introductory No. 273 (annexed hereto as Exhibit "A") introduced by Senator Zaretzki. At a public hearing held in Albany on February 26, 1964, before the Joint Legislative Committee to Study the Alcoholic Beverage Control Law and the Senate and Assembly Excise Committees, Senator Zaretzki requested the Honorable Lawrence E. Walsh, Chairman of the Moreland Act Commission, to furnish the Committees with certain additional information with respect to the proposals contained in his bill, including the questioned proposals which were eventually enacted into law. The Moreland Act Commission, through its special counsel, William W. Golub, gave such information in a letter addressed to Senator John J. Marchi, a copy of which is annexed hereto as Exhibit "B." In that letter Mr. Golub in remarking on what are referred to herein as the constitutionally objectionable parts of the bill, said:

"There is substantial doubt as to the constitutionality of the bill amended as indicated above. The distillers have brought an action to review the constitutionality of a similar statute in Kansas. They contend that, [fol. 35] in the light of the complicated economic issues sought to be dealt with, the statute is too vague and indefinite to satisfy due process requirements. In addition, they contend that the statute violates the commerce clause of the United States constitution because it is an attempt by one state to control national pricing. A preliminary injunction restraining the enforcement of the statute was granted by a Kansas court in June 1961 and is still in force."

The Kansas case referred to is an unreported decision of the Third Judicial District of Kansas, Topeka, Kansas,



rendered May 7, 1964, which held a Kansas maximum liquor pricing act similar to Section 9 of Chapter 531 unconstitutional because of violations of the commerce, due process and equal protection clauses of the Constitution of the United States and the due process and equal protection clauses of the Constitution of the State of Kansas.

17. The minutes of the aforesaid meeting of February 26th indicate that in response to questioning from Senator Zaretzki, Judge Walsh indicated his doubts as to the constitutionality of those provisions. He stated:

"If the provision were constitutional, if it were enforceable, you could save perhaps the distiller's share of that. But you couldn't save the wholesaler's and retailer's share and the consumer still wouldn't get his dollar back" (p. 37, Transcript of Minutes of Public Hearing).

18. In response to further questioning from Senator Zaretzki, Judge Walsh made the following additional statement:

"This would be really a hopelessly unenforceable job. It would mean that the New Yorker is supposed to run around checking prices in 50 states, and the Anti-[fol. 36] Trust Division of the Department of Justice can't do that, even with the F.B.I. to help them. I think it would be really a vain effort. I mean the State Liquor Authority has enough hopeless jobs to do without giving it another one" (p. 38, Transcript of Minutes of Public Hearing).

19. Annexed hereto as Exhibit "C" are excerpts of the pertinent parts of the transcript which Judge Walsh made in the Stenographer's Transcript of the Hearing.

20. In connection with this action for a temporary injunction, there are also annexed hereto as exhibits the following:

Exhibit "D"—Study Paper No. 5 entitled Resale Price Maintenance in the Liquor Industry, dated October 28, 1963;

Exhibit "E"—Copy of Report and Recommendation No. 3 entitled Mandatory Resale Price Maintenance, dated January 21, 1964, containing the conclusions and recommendations of the Moreland Act Commission relative to this proceeding;

Exhibit "F"—Copies of the Governor's Messages to the Legislature dated February 10, 1964, and April 16, 1964.

21. Former Section 101-c of the Alcoholic Beverage Control Law, as amended by Chapter 689 of the Laws of 1950, provided for mandatory resale price maintenance of liquor at the retail level. The mandatory resale price was enforced by the State Liquor Authority. In short, under the prior law, retailers could only sell to the public at a price fixed by the distiller, and sales at such fixed prices were enforced by the New York State Liquor Authority.

22. The Moreland Act Commission arrived at the conclusion that this so-called mandatory price maintenance [fol. 37] resulted in the New York consumer paying approximately \$1.00 more a fifth than generally was paid elsewhere in the country (see Exhibit "E," p. 30) and recommended repeal of the mandatory price fixing provisions. Section 11 of the present law did so. In so doing, the Legislature said (Section 8 of the present law): "Enactment of Section 11 of this Act [i.e., the section repealing the mandatory price maintenance provisions of the former law] will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." But the Legislature went on to say in Section 8 that the maximum price provisions of Section 9 of Chapter 531 are necessary "In order to forestall possible monopolistic and anti-competitive practices designed to frustrate

the elimination of such discrimination and disadvantage \* \* \*."

23. In other words, the objectionable features of Chapter 531 of the Laws of 1964 are not designed to correct a situation which may lead to intemperance or a presently existing social evil or to presently give the public the benefits of open competition, but rather to forestall possible monopolistic and anti-competitive practices not presently in being, but which may occur in the future.

24. It is difficult, therefore, to see how any great injury can be done to the State or to the people thereof by suspending the operation of those sections of the law objected to here pending the disposition of this action.

25. For all of the reasons stated in the moving affidavits, it is apparent that irreparable injury will be suffered by the plaintiffs if a temporary injunction is not granted pending the testing of the constitutionality of those parts of the law which are objected to in this action.

26. For the reasons set forth above, it is respectfully requested that pending the outcome and determination of the motion for a temporary injunction, a stay of the enforcement of the aforesaid provisions also be granted.

[fol. 38] 27. No previous application for the relief sought herein has been made.

(Sworn to by Thomas F. Daly, October 28, 1964.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY  
STATE OF NEW YORK

Print. 273

Intro. 273

IN SENATE

(Prefiled)

January 8, 1964

—  
Introduced by Mr. ZARETZKI—read twice and ordered  
printed, and when printed to be committed to the Com-  
mittee on Excise

AN ACT

To amend the alcoholic beverage control law, in relation  
to information to be contained in schedules of prices for  
liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in  
Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred  
one-b of the alcoholic beverage control law is hereby  
amended by adding thereto a new paragraph, to be para-  
graph (f), to read as follows:

[fol. 39] *(f) No manufacturer or wholesaler may file a  
schedule pursuant to this section offering for sale any item  
or brand which is offered for sale by such manufacturer or  
wholesaler, or subsidiary thereof, in any jurisdiction in any  
state of the United States at a price, exclusive of state  
taxes, lower than offered in this state for the same period,  
except that differentials may be made to allow for differ-  
ences in actual costs of shipment f.o.b. place of original  
warehouse.*

*Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states.*

§2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

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## STATE OF NEW YORK

Print. 273, 4518

Intro. 273

IN SENATE

(*Prefiled*)

January 8, 1964

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Introduced by Mr. ZARETZKI—read twice and ordered printed, and when printed to be committed to the Committee on Excise—committee discharged, bill amended, ordered reprinted, as amended and recommitted to said committee

[fol. 40]

## AN ACT

To amend the alcoholic beverage control law, in relation to information to be contained in schedules of prices for liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred one-b of the alcoholic beverage control law is hereby amended by adding thereto a new paragraph, to be paragraph (f), to read as follows:

(f) *No manufacturer or wholesaler may file a schedule pursuant to this section offering for sale any item or brand which is offered for sale by such manufacturer or wholesaler, or subsidiary thereof, in any jurisdiction in any state of the United States at a price, exclusive of state taxes, lower than offered in this state for the same period, except that differentials may be made to allow for differences in actual costs of shipment f.o.b. place of original warehouse.*

*Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states and shall, from time to time as may be necessary, file with the liquor authority, under oath, a statement that the price at which each such brand or item is being offered for sale in this state is as low as the lowest price at which the same is being offered for sale in any other state.*

*The liquor authority shall establish and from time to time as may be necessary amend schedules establishing maximum prices at which any item or brand may be sold or offered for sale in this state at retail, which shall be sufficient to provide the retailer a reasonable return and at the same time protect the purchaser against excessive and unreasonable retail prices.*

[fol. 41] §2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

## STATE OF NEW YORK

Print. 273, 4518, 4604

Intro. 273

## IN SENATE

*(Prefiled)*

January 8, 1964

—

Introduced by Mr. ZARETZKI—read twice and ordered printed, and when printed to be committed to the Committee on Excise—committee discharged, bill amended, ordered reprinted, as amended and recommitted to said committee—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

## AN ACT

To amend the alcoholic beverage control law, in relation to information to be contained in schedules of prices for liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred one-b of the alcoholic beverage control law is hereby amended by adding thereto a new paragraph, to be paragraph (f), to read as follows:

[fol. 42] *(f) No manufacturer or wholesaler may file a schedule pursuant to this section offering for sale any item or brand which is offered for sale by such manufacturer or wholesaler, or subsidiary thereof, in any jurisdiction in any state of the United States at a price, exclusive of state taxes, lower than offered in this state for the same period, except that differentials may be made to allow for differences in actual costs of shipment f.o.b. place of original warehouse. In computing prices for any of the purposes of this subsection, no allowance shall be made for advertising.*

depletion and promotional allowances or rebates of any kind whatsoever made to purchasers by the vendor.

Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states and shall, from time to time as may be necessary, file with the liquor authority, under oath, a statement that the price at which each such brand or items is being offered for sale in this state is as low as the lowest price at which the same is being offered for sale in any other state.

The liquor authority shall establish and from time to time as may be necessary amend schedules establishing maximum prices at which any item or brand may be sold or offered for sale in this state at retail, which shall be sufficient to provide the retailer a reasonable return and at the same time protect the purchaser against excessive and unreasonable retail prices.

§2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.



[fol. 43]

EXHIBIT B, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY  
NEW YORK STATE MORELAND COMMISSION ON  
THE ALCOHOLIC BEVERAGE CONTROL LAW

230 PARK AVENUE

NEW YORK 17, NEW YORK

MU 9-4822

March 9, 1964

Hon. John J. Marchi  
Chairman, Joint Legislative Committee  
for the Study of the Alcoholic Beverage Control Law  
State Capitol  
Albany, New York

Re: *S. Int. 273*

Dear Senator Marchi:

At the request of the Moreland Commission, I take the liberty of submitting to you in this letter an analysis of S. Int. 273. At the hearing before the Joint Committee and the two Excise Committees on February 26, Senator Zaretski, the introducer of S. Int. 273, raised certain questions about that bill. Those questions will be considered in this letter.

S. Int. 273 would require a distiller to sell any brand of whiskey to his New York wholesalers at the lowest "price" at which he sells that brand in any other state during the month in which the sale occurs. The bill is designed to prevent distillers from discriminating against New York wholesalers by selling at lower "prices" in other states.

1. The fatal defect of S. Int. 273 is that it leaves the distillers in complete control of consumer prices. It would not in any way obligate the distillers to reduce the retail [fol. 44] prices fixed by them. Even if the prices they

charge wholesalers were reduced, high retail prices could continue to be imposed by the distillers. Unless mandatory resale price maintenance is repealed, lower distiller prices could merely mean higher profits for wholesalers and retailers with no benefit to consumers.

2. A vital shortcoming of this bill in accomplishing even its limited objective is its use of the word "price." It is established industry practice to interpret the word "price" to mean invoice price (f.o.b. distillery). "Price" thus means something altogether different from the distiller's actual realization or the wholesaler's actual cost after giving effect to the various allowances and other forms of assistance granted by the distiller to the wholesaler. "Price" or invoice price is, as the distillers claim, essentially uniform throughout the country except for a minor reduction to the monopoly states. As a result, the bill in its present form would merely bring distillers' prices in New York into parity with their prices in the monopoly states.

3. The experience of the monopoly states, which have provisions in their contracts with distillers analogous to S. Int. 273, demonstrates the ineffectiveness of this type of requirement. The prices charged to monopoly states are only about 4¢ to 12¢ a fifth below the New York invoice prices. They do not reflect the lower actual realizations of the distillers in markets where allowances are granted to wholesalers.

4. S. Int. 273 might be amended so as to reflect in the distillers' "prices" the various types of allowances and assistance they give wholesalers. In that event, the usefulness of the bill would be undermined by the extremely expensive and complicated enforcement problems it would present. The State would be required to engage a large corps of accountants and lawyers for full-time employment [fol. 45] in reviewing the books, records, accounts, and nation-wide transactions of each distiller. This task would have to be conducted on a regular and continuous basis,

and would involve even more complex problems than the State's present supervision of utility companies.

Effective enforcement would require a determination of the amount that each distiller actually realizes from his sales each month in each of the 49 other states. This would mean, in the first instance, an analysis of the myriad transactions between each distiller and each of his wholesale customers. In addition, it would undoubtedly necessitate the exploration of transactions with other persons, such as the wholesalers' salesmen. Many of these others, since they would be outside of New York, might not be subject to subpoena. In addition, to determine whether the distillers were making more money on their New York sales than on their sales elsewhere, it would be necessary to make detailed determinations as to their costs and the allocation of those costs.

It is apparent, therefore, that the enforcement of the law would lead to a series of involved and expensive administrative proceedings, not unlike utility rate cases, in which a morass of data would be presented and extremely complex issues would have to be resolved. The expense of enforcement would be mammoth and enforcement might well bog down under its own weight. In addition, because of the types of issues involved, there would be a tremendous inducement to attempt to corrupt the persons with the decision-making powers.

5. There is substantial doubt as to the constitutionality of the bill amended as indicated above. The distillers have brought an action to review the constitutionality of a similar statute in Kansas. They contend that, in the light of the complicated economic issues sought to be dealt with, the [fol. 46] statute is too vague and indefinite to satisfy due process requirements. In addition, they contend that the statute violates the commerce clause of the United States constitution because it is an attempt by one state to control national pricing. A preliminary injunction restraining the enforcement of the statute was granted by a Kansas court in June 1961 and is still in force.

6. If the purpose of this bill is to bring to New Yorkers the benefits of lower consumer prices, the simplest, most direct, and the only completely effective way of achieving this objective is to return to free competition. The experience in Washington, Chicago, St. Louis, Miami, and Houston demonstrates that the level of consumer prices can be brought to more than \$1 a fifth below New York prices where a free market is permitted to reign. None of these cities has any law resembling S. Int. 273. With free competition, no such legislation is necessary. A free market is a built-in regulator of prices. Consumer prices and distiller prices will both be reduced to their proper economic levels by the natural regulations of the free market.

Respectfully yours,

WILLIAM W. GOLUB

Copies to: All Members of the Joint Legislative Committee  
for the Study of the Alcoholic Beverage Control  
Law and of the Senate and Assembly Excise  
Committees

[fol. 47]

EXHIBIT C, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

• • • • •  
hearings in the '30's. In 1948, as I said, Chairman O'Connell and the State Liquor Authority decided to declare another moratorium rather than put up with the charges and counter-charges that they were being subjected to.

In 1952 the Crime Commission found misconduct and then Irwin Shapiro at the beginning of the Harriman Administration made an investigation. There were fifteen resignations, many of them after people had claimed the Fifth Amendment. And now we have District Attorney Rogan's investigation.

This led to our appointment as a Commission. And we, having been introduced into this responsibility because of

these charges of corruption, have looked to see whether, in the law, there was any basis for them. And we have found the basis, we think, in these subjective standards, these unworkable and unrealistic provisions which an agency is directed to enforce when it knows it can't enforce them.

And then we have also disclosed, I think, a broader, a more subtle form of corruption where an agency of essentially honest men are really brainwashed by an industry and led from the objectives for which they were appointed and which the law was directed to into new objectives which are not in the law any more. Now this is a very subtle thing and the damages that have occurred to this State as a result of it are significant.

The objective of this law as it is now written is temperance.

That's the only justification for the law. Well it's been an utter failure in that because consumption rates in New York have gone up along with those of the Nation. They have paralleled them; indeed of stores, I think, ever since repeal—about 400 in my recollection.

Q. So perhaps in that one respect the conditions are not identical. A. Well, we have the same here, of course, now. [fol. 48] Q. But not identical in the sense that we would not be duplicating the same situation that exists in Washington if we had on the one hand a doing away with price maintenance and then unlimited issuance of licenses. A. Then we would have made both changes, whereas Washington has only one. On the other hand, in St. Louis, Missouri you have exactly that situation. Missouri does have an unlimited number of stores and the freedom from price restriction.

Q. Now I notice in some of these prices (referring to the chart)—I just go to Dallas and New York because they're next to each other—in some cases if you add the tax New York comes out cheaper, in other cases there's a marked difference and Dallas is considerably cheaper. A. The interesting thing is between Dallas and Houston. There is a completely different result.

Q. Well we have J & B comes out about even, doesn't it? Fleischman is cheaper. We're not accomplishing anything here, really.

But I think Dallas is much higher than Houston, for some reason. A. There may be other factors.

Q. There may be other factors there, that's right. But we put both of them in. A. Do you find that in the range of alcoholic beverages there is a substantial difference on the price charged by the distillers going into the various states? And again I am referring to the very probative point raised by Senator Zaretzki.

Q. I'm sure we have not attempted to find out how the excess is divided among the distiller, wholesaler and retailer. All we say is that you cannot assume that the distiller has a uniform price because he has a uniform price scale. A. This is not to depreciate the work done by Dr. Wattel, but on the discussion of price and consumption—and of course you brought out in your report there may be other answers to this—if his point was valid that price does affect consumption, there may be other remedies to meet that situation.

[fol. 49] Q. I think Dr. Wattel speaks of consumption in the matter of sales. But that doesn't mean there's an increase in consumption. If customers start buying in New York instead of New Jersey, they aren't drinking any more, just buying in New York instead of New Jersey. And I'm sure that happens in Washington, that people in the surrounding areas who work in Washington buy in the Washington stores to save money. A. You don't think that the public likes to get a bigger bang for the buck?

Q. The bang seems to be limited by things other than the buck. You can only take so much of it. A. The Toronto School of Research has been conducting surveys that would indicate some relationship between the

income and the incidence of cirrhosis of the liver. Now just what value this has I don't know, but in this connection I was wondering whether Professor Wattel

did have a control committee to establish the validity of the system of survey. Now his report states that

Q. The retail price will still be as high as they want to make it. But wait a minute—I didn't get that far. My bill doesn't—now, you put your finger on what I think is the nub of the thing. You permit the distiller not only to charge what he wants to, but you give him the right to tell the retailer, "You must charge so much." If you take that power away from him, and he can't do that, now can't you pass on the saving to the consumer by requiring the State Liquor Authority to set the mark-up price, a fair mark-up price to the retailer and to the consumer? Not the retailer, but the consumer. A. Then what you'd have to have is an agency like the Public Service Commission with conduct of rate studies and service studies, and you'd have a complicated agency to do that which a free market would do for us for nothing. See, in the case of a public utility where only one power company can serve an area efficiently, you need the regulation of a monopoly, but [fol. 50] when anybody can sell liquor what we can't understand is why you need that type of regulation. Let anybody come in and sell it and sell as cheaply as they can, the way they do in St. Louis.

Q. I admit there are two ways of doing it: your's is one way and I'm trying to find out whether mine is another way. A. I think that your's is at most a supplement to my way, but it would not be a substitute for it.

Q. Well if we compelled the distiller to charge as low a price as anywhere, and then the State Liquor Authority fixes a fair mark-up, giving the retailer a living wage, and still saving the consumer the dollar or two. And I can go to Bennington, Vermont and save two dollars a bottle. A. You can get some pretty good bargains if you shop around the country.

Q. Well I regret to tell my constituents who are here in large numbers that I buy a lot of liquor in Bennington, Vermont. A. Only in the summertime, Senator.

Q. But the point is that we could save the consumer the \$150,000,000 by making the distiller charge us no more



than he does in any other state, and then having the State Liquor Authority fix a fair mark-up, fair for the consumer, and fair for the retailer. A. If the provision were constitutional, if it were enforceable, you could save perhaps the distiller's share of that. But you couldn't save the wholesaler's and retailer's share and the consumer still wouldn't get his dollar back.

Q. Wait a minute, I'm coming to that. I've been talking about a sale from the distiller to the retailer and then to the consumer. And now we have an intermediate group known as wholesalers or distributors. Did your study show that most of these distributors are owned by the distillers? A. No. We have not checked into that.

Q. Well, will you make a note of that too? A. You've given us quite a bit of work. May I borrow a pencil, Mr. Chairman? I don't think you're going to find in New [fol. 51] York any interlocking ownership. You may find in other areas that there is that, but as I say we have not studied it. I wouldn't want to speculate.

Q. Don't let's speculate. I want you to continue for another couple of years, and let's get to the bottom of this. We are now agreed that if we fixed a minimum price for the distiller that they must not charge us more than anybody else, and if a fair mark-up was made by the State Liquor Authority on that price to the retailer and the consumer, that we could save the consumer the same \$150,000,000. A. I don't think it would ever work as well. You might save him something, but there's nothing like a free market to get prices down to rock bottom.

Q. I don't know how much freer a market you need than the entire 50 states of the Union, and the distiller swears that he's selling to us at as low a price as he's selling anywhere else. A. This would be really a hopelessly unenforceable job. It would mean that the New Yorker is supposed to run around checking prices in 50 states, and the Anti-Trust Division of the Department of Justice can't do that, even with the F. B. I. to help them. I think it would be really a vain effort. I mean the State Liquor



Authority has enough hopeless jobs to do without giving it another one.

Q. Don't let's go into that at the moment because there must be something to this since the distillers are fighting the Kansas law so hard. If there wasn't any teeth in it, they wouldn't mind. The thing that I want you to study further, your Commission—I mean, I ask you, please, to do it—and that is how many intermediate steps are there in this State between the distiller and the retailer, and how many mark-ups are there? And do you need it all—the method of marketing? Who owns the distributors and the wholesalers?

[fol. 52] By Mr. Ambrose:

Q. Mr. Coyne, before I start, may I compliment you on a very delightful statement. It was a great piece of literature. A. Thank you very much.

Q. I would like to ask a couple of questions. Judge Walsh made reference today to a letter from Mr. Lynn, General Counsel of Seagram's in which he made reference to depletion allowances which are, I gather, allowances made by distillers to wholesales subsequent to the sale of the merchandise by the distiller to the wholesaler. In other words, if he's got a large—could you explain this, please, and what effect this may have on the net price paid over the course of a year? A. Well, I can't explain it with any precision. I will give you my impression of what is meant. Now the prices from distillers to wholesalers is constant. Now that does not mean that it does not admit of sales rhythm and imagination in marketing liquor. Now, as I understand it, within certain confines—and they're very small—a supplier will endeavor to establish a bit of excitement in a certain market. And for that purpose he may join in a joint promotion with the wholesaler in that market, and with the result that some depletion allowance, or some credit memorandum will vary the price for an instant to providing the exciting sales rhythm that I mentioned. And that may be seen in different mar-

kets, not at the same time. But the whole sum total of that relationship averages out to a price that is average across the country. And you are aware, of course, that why we resist any legal fixing of distiller's prices, either by reference to another state or to any other measurement. That does not mean that distiller's prices are not constant. Now they are constant for a very good reason. We have, for example, the State of Pennsylvania which is the largest purchaser of liquor in the world. I think they purchase almost \$400,000,000 worth of liquor a year—one customer. They swing a very big bit of leverage, and you [fol. 53] cannot be convinced that that Pennsylvania customer does not insist on the lowest price that the distiller offers anywhere in the country. And it's significant, I think, the price in Pennsylvania is the same f. o. b. price, or virtually the same price, as is offered in New York. So any exercise of imagination by these sales geniuses—and they are sales geniuses—is in such a narrow area that it would even itself off over a period. From the distiller's point of view probably by a temporary response, and from the wholesaler's point of view by concentrating on "my" brand this month, and someone else's brand the next month. But I have examined with great cynicism this idea of my own clients when they tell me that they sell with a constant f. o. b. price, and I've been at it five years. And about midway at that time I became convinced, and I reached the conclusion that I was being the cynic, and strange as it might appear to some segments of the public I found the suppliers on the level. I have dealt with many different business groups in my time, and not only are they more intractable—and if I seemed to be a little bit spirited earlier when I said it was not a rash assumption at some point in our professional existence to assume that another group is on the level—gentlemen, I meant that. And I wish you would take the posture that I took when I took my job, and I examined the bona fides of these people one by one. Now, I'm not going to say that there are not fakers amongst them. But I give you

my word, and I say it's an informed opinion because I've been in law enforcement too, for 23 years, and I think I can spot crooks and fakers as quick as the next one, and I'll tell you—and you have my word for it—that this group subscribe to ethical standards that cannot be matched in any other merchandising group. And I'd be very happy to elucidate on that some time if you have the time.


[fol. 54] Q. In effect, your contention, if I understand you correctly, is that this depletion allowance is used in the same fashion as the post-off or file-off arrangement is used. A. That's as I understand it. I wish I knew more about that. But let me give you what I think is proof. I mentioned the State of Pennsylvania. Now the State of Pennsylvania has a contract which permits them to send accountants into any supplier's office—and they do. They send corps of accountants into supplier's offices to determine whether or not they're getting the best price. And in fact, if they were not they would have a violation of contract which would make each supplier restore to the State of Pennsylvania the difference between that and the constant price that is serviced elsewhere.

Q. Is it possible, or is it probably, or does it come about in any way that you're aware of that the arrangements whereby retailers in the District of Columbia constantly sell liquor at loss-leader levels insofar as it may come about as the result of some malpractices or illegal practices between the wholesaler and the retailer? A. No, I think the wholesaler probably doesn't take the mark-up such as

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[fol. 55]

EXHIBIT D, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

(See opposite) 

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NEW YORK STATE MORELAND COMMISSION  
ON THE  
ALCOHOLIC BEVERAGE CONTROL LAW

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Study Paper Number 5

Resale Price Maintenance in the Liquor Industry

October 28, 1963



230 Park Avenue  
New York 17, N. Y.

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## RESALE PRICE MAINTENANCE AND THE LIQUOR INDUSTRY

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## PREFACE

The New York State Moreland Commission on the Alcoholic Beverage Control Law commissioned this study in July of this year as one part of a broad examination of the efficacy and desirability of maintaining stringent government supervision and protection of New York's alcoholic beverage industry and the consumers of its products. This segment of the investigation is concerned almost exclusively with the effect of income and price on the demand for distilled spirits. Insofar as the focus here is economic and hence limited, the reader is referred to the Commission papers which treat other facets of alcoholic beverage consumption.

Although this paper carries the name of a single author the counsel of my friends and colleagues is reflected in its pages. I gratefully acknowledge the help received at various stages of this project. Thanks go to Dr. Donald J. Dewey (Columbia University) for his views and comments on the entire manuscript, to Dr. Harvey J. Levin (Hofstra University) for his suggestions on the paper's organization and content, to Mrs. Hyman Lichtenstein for aid with the statistical analysis, to Dr. Richard P. Brief (New York University), and Dr. John E. Ullmann and Dr. Frederic Stuart (both of Hofstra University) for their comments on the correlations, and to Dr. Nathan Goldfarb and Mr. Lowry McKee of Hofstra's Computer Center for their cooperative efforts which made possible the processing of the data by computers. Dr. Mark B. Schupack (Brown University) made constructive suggestions for the strengthening of the analysis.

Mrs. Miriam G. Cedarbaum of the Commission's staff proved to be a friendly critic; her helpful suggestions contributed much to the final stages of the work. The Commission's clerical and professional staff were most efficient and cooperative at all stages of this undertaking.

My wife's editorial advice was particularly welcome as was her patience.

In the last analysis, however, the shortcomings of this work remain the sole responsibility of the author.

HAROLD L. WATTEL  
*Chairman, Division of Business  
Hofstra University*

[fol. 59]

## I. INTRODUCTION

How much control should New York State exercise over the sale of alcoholic beverages within its borders? The question, should New York State retain mandatory resale price maintenance for the marketing of branded alcoholic beverages is just one aspect of the larger question. This background paper approaches this latter question by examining the structure of the alcoholic beverage industry and one aspect of its marketing arrangements—resale price maintenance. The distilling industry is the main focus here. Malt beverages are now sold through grocery stores and are not subject to the more stringent regulations applicable to distilled and fermented alcoholic beverages. Their low alcoholic content places them apart. Wines are subject to the same regulations that affect the sale of distilled spirits, but since they are lower in alcoholic content and price they need not be treated separately here either.

The price controls now in effect on distilled spirits in New York State can be traced to demands for such controls from industry members in the heat of liquor price wars which developed before World War II. The State Liquor Authority described the New York City market in these terms:

"During the last four months of 1940, unstable market conditions prevailed in the Metropolitan New York area. In their eagerness to 'corner' the New York City market, which is reputed to be the largest local market in the country, some distillers reduced prices to the point which, according to reports, was less than the cost to the manufacturer. Secret rebates and 'kick-backs' were granted. Differentials in prices among buyers in the same license class were rampant, and the consumer could purchase liquor from the package store at a price lower than that which the restaurant or tavern keeper was required to pay to the wholesaler."<sup>1</sup>

The Authority blamed the distillers for the unsettled conditions.<sup>2</sup>

The mandatory resale price maintenance<sup>3</sup> solution in New York State seems strange in view of this contention. It handed to the

1. 1940 Report of the New York State Liquor Authority, p. 13.

2. *Ibid.*, pp. 14-15.

3. Distillers must file minimum prices for their branded merchandise and the State Liquor Authority assumes the responsibility for the policing of those prices. Under general resale price maintenance, the producer stipulates minimum prices for his branded merchandise and assumes the burden of policing.

[fol. 60]

distillers, those alleged to have instigated the price wars, the right to fix prices vertically. The main beneficiaries appear to have been the New York State retailers, the main victims, the New York State consumers.

Distiller prices which were originally set high under the cover of the mandatory resale price maintenance statute in New York State have been altered infrequently.<sup>4</sup> Nor have the major distillers seen fit to compete actively with each other by overt price cutting at the retail level.<sup>5</sup> In the face of such price behavior distiller unit profit margins probably have declined.<sup>6</sup> Wholesale and retail distributors meanwhile applied their markup percentages to their invoice costs which included higher taxes, and in this way protected themselves somewhat from the pressures exerted by increasing costs.<sup>7</sup>

The use of the police power of the State to enforce private decisions of manufacturers seems unnecessarily severe medicine for a relatively minor ailment. If New York prices must remain high, the State has ample power to keep them high without delegating price fixing power to private individuals and without committing itself to police their decisions. But must prices remain high?

This paper attempts to review the evidence relevant to this question. We begin with a review of the structure of the distilled spirits industry and the relationships between the trade levels.

4. Harold L. Wattel, *The Whiskey Industry*, unpublished doctoral dissertation available from The New School library, pp. 425-426.
5. Competing brands remain within pennies of each other in the major markets. For example, Seagram's 7 Crown retails for \$4.99, Schenley Reserve for \$4.99, Kinsey Gold for \$5.00, G & W 7 Star for \$4.99, and Bellow's Partners Choice for \$4.99 in New York.
6. The First National City Bank reports that in distilling the profit margin on sales has fallen from a high of 7.2 per cent in 1948 to 3.9 per cent in 1962.
7. Wholesaler and retailer margins have also risen. The retailer paid \$3.20 per fifth for Seagram's 7 Crown in 1950 and sold it for \$4.05, a markup of 26.6 per cent. In 1963 he paid \$3.82 for the fifth and resold it for \$4.99, a markup of 30.6 per cent. In 1950 the markup amounted to \$0.85 and the same markup in 1963 would have given him an absolute amount of \$0.99. However, with the increased percentage markup his absolute amount is increased to \$1.17. In 1950 the wholesaler operated on a markup of less than 15 per cent for this brand; today his markup is more than 20 per cent.

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## II. INDUSTRY STRUCTURE

### A. Concentration in Alcoholic Beverage Manufacturing

The manufacture of alcoholic beverages is one of the more highly concentrated industries in the nation.

TABLE 1

Percent of Value of Shipments and Employment Accounted for by the Largest Companies in Alcoholic Beverage Production, 1958, 1954, and 1947.

SIC Number	Industry	1958 First		1954 First		1947* First	
		4	8	4	8	4	8
		Companies		Companies		Companies	
		(percentages)					
2082	<i>Beer and Ale</i>						
	Value of Shipments	28%	44%	27%	41%	21%	30%
	Employment . . . . .	24	39	22	35	19	30
2084	<i>Wines and Brandy</i>						
	Value of Shipments	35	50	38	54	26	42
	Employment . . . . .	27	37	23	36	N.A.	N.A.
2085	<i>Distilled Liquor</i>						
	Value of Shipments	60	77	64	79	75	86
	Employment . . . . .	57	71	57	73	74	88

\* 1950 for employment.

Sources: *Concentration Ratios in Manufacturing Industry 1958*, Report Prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 87th Congress, 2nd Session, Washington 1962, pp. 12 and 78.

From Table 1 one can see that the beer, ale, wine and brandy industries became increasingly concentrated after 1947 when measured by the value of shipments and employment. In fact, when measured by employment, concentration in these two industries continued after 1954. Concentration in distilling, however, decreased in the two census years since 1947. There are many reasons for this latter development. At the end of World War II the major firms had excellent grain allocations, a good hold on cooperage, and supplies of aged whiskey.<sup>8</sup> With the easing of shortages of these

8. Harold L. Wattel, *op. cit.*, Chapter 3.

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raw materials for bottled liquor production and with brand-taste shifts, the hold of the "big four" distillers (Distillers Corporation-Seagrams, National Distillers, Schenley Industries, and Hiram Walker) on the market was reduced. Distilling, however, remains more concentrated than the other two segments of the alcoholic beverage industry.

The three segments of the alcoholic beverage industry accounted for less than six per cent (5.7 per cent) of the employment in the Food and Kindred Products Industry and less than ten per cent (9.5 per cent) of the value added of the Food and Kindred Products Industry (SIC 20) in 1958.<sup>9</sup> Nevertheless, eight of the companies in alcoholic beverages were among the nation's 500 leading industrial corporations in that year.<sup>10</sup>

Three of the four major distillers, National Distillers & Chemical Corp., Jos. E. Seagram & Sons, Inc. and Schenley Industries, Inc., are among the nation's 500 largest industrial companies, ranking 173, 174, and 268 respectively.<sup>11</sup> The size of the four major firms, however, may be traced to acquisitions before 1951, as Table 2 illustrates:

**TABLE 2**  
**Acquisitions of Companies by the Four Largest Distillers,**  
**1933-1948**

Distiller	Distillery	Nature of Facility		
		Winery (Number)	Cooperage	Other
National Distillers .....	20	1	3	8
Jos. E. Seagram & Sons .....	15	2	1	6
Schenley .....	16	3	2	11
Hiram Walker .....	7	6	2	3

Source: Federal Trade Commission, *The Merger Movement, A Summary Report, 1948*.

9. *Concentration Ratios in Manufacturing Industry 1958*, Report prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U. S. Senate, 87th Congress, 2nd Session, Part II, p. 388; and Statistical Abstract of the United States, 1962, pp. 774-5.
10. *Mergers and Superconcentration, Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Staff Report of the Select Committee on Small Business, House of Representatives, 87th Congress, November 8, 1962, pp. 46-53.
11. *Ibid.*

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While many of the pre-World War II and immediate post-World War II acquisitions involved facilities intimately related to distillery operations, at least the more recent acquisitions of one company reflect efforts by management to diversify. National Distillers acquired the following firms in the decade 1951-1961: U. S. Industrial Chemicals, Inc., Algonquin Chemical Co., Hegeler Zinc Co., Met-Electro Corp., Panhandle Eastern Pipe Line Co., Kordite Corp., Textron, Inc., Mallory-Sharon Metal Corp., Federal Chemical Co., Inc., Minnesota Liquid Fertilizer Co., Wisconsin Farmco Service Co-operative, Inc. and Bridgeport Brass Co. In fact, the company is now known as National Distillers and Chemical Corporation, a change from the earlier National Distillers Products Corporation.<sup>12</sup>

While there is considerable criticism of concentration ratios based on corporate or industry data rather than product data, such criticism is less valid for the alcoholic beverage industries and for the distilled spirits industry, in particular. Competition in these industries is limited to their own products. While distilled spirits do compete with the lower alcoholic content and lower cost products, e.g., beers and wines, and to a very minor degree, non-alcoholic beverages,<sup>13</sup> the industry agrees that interbrand competition within distilled spirits types and inter-type competition, e.g., gin versus vodka, is the type of competition which concerns the individual company.<sup>14</sup>

### B. *The Economic Effects of Concentration*

When a significant proportion of an industry's employment or shipments is in the hands of a few firms (the four largest firms in distilled spirits were responsible for 60 per cent of the shipments and 57 per cent of the employment in 1958), economists expect that it will have certain characteristics. For example, an economist expects to find the following: 1. It is difficult for new firms to enter that industry either because of natural or manmade barriers. 2. Prices in that industry are likely to be relatively high and stable, especially in comparison to commodities traded on organized exchanges, because a community of interest tends to be recognized. 3. Competition may be intense between the industry leaders but will

12. *Mergers and Superconcentration, op. cit.*, p. 126.

13. Harold L. Wattel, *op. cit.*, Chapter 4.

14. *Ibid.*



[fol. 64]

probably be in the form of sales promotion rather than price promotion. 4. Costs may be high in the industry and it may be afflicted with much excess capacity. 5. There will be a great variety of product types in the industry.

This is not an inaccurate picture of the distilled spirits industry, although some of the elements must be qualified.

### 1. Entry

In the matter of entry, there are many barriers in the form of brand names which have consumer acceptance, capital expenditures, working capital for the large promotional expenditures required, and the like. Fifteen years ago, warborn shortages of grain and cooperage would have created difficulties for the new firm; they created problems for the old. Today, these are all in good supply. Aged whiskey is also in good supply, so these can no longer be considered as keeping new firms from the industry. Nevertheless, there has been a steady attrition of plants and firms from the industry, although some of this occurred through mergers. Census data show a decline in the number of companies from 144 in 1947 to 98 in 1954 to 88 in 1958.<sup>15</sup> According to the Alcohol and Tobacco Tax Division, production facilities increased in the pre-war period and declined in the post-war period.

TABLE 3  
Facilities Operated to Produce Beverage Alcohol from  
Grain and Fruit,\* Selected Fiscal Years,  
1934-1962

1934	.....	170
1937	.....	311
1942	.....	282
1947	.....	333
1952	.....	239
1957	.....	188
1962	.....	170

\* Does not include facilities for rectifying distilled spirits.

Source: U. S. Treasury Department, *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, Publication 67 (1961), p. 23.

15. 1958 Census of Manufacturers, MC58(2)-20G, Beverages, pp. 4-5.



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There has been no major new firm in the industry since World War II and no major firm has disappeared except through mergers.<sup>16</sup> As noted above, the industry is heavily concentrated, with four firms accounting for 60 per cent of shipments in 1958, and the first 20 firms, 94 per cent.

## 2. Prices

Prices have remained relatively stable except for tax changes in the post-war period. These are summarized next in terms of rates (State: per wine gallon and Federal: per proof gallon).

TABLE 4  
Federal and Average State Tax Rates

Year	Average State Tax Per Fifth of Distilled Spirits*	Federal Tax Per Fifth of 86° Distilled Spirits	Combined Amount	Tax Index 1947=100
1947 .....	\$0.30	\$1.55	\$1.85	100
1948 .....	.31	1.55	1.86	101
1949 .....	.32	1.55	1.87	101
1950 .....	.32	1.55	1.87	101
1951 .....	.31	1.81	2.12	115
1952 .....	.31	1.81	2.12	115
1953 .....	.31	1.81	2.12	115
1954 .....	.31	1.81	2.12	115
1955 .....	.33	1.81	2.14	116
1956 .....	.33	1.81	2.14	116
1957 .....	.33	1.81	2.14	116
1958 .....	.33	1.81	2.14	116
1959 .....	.35	1.81	2.16	117
1960 .....	.35	1.81	2.16	117
1961 .....	.37	1.81	2.18	118
1962 .....	.37	1.81	2.18	118

\* New York State tax has remained at \$1.50 per wine gallon since May 1939.

Source: Distilled Spirits Institute, *Distilled Spirits Annual Statistical Review*, 1962, p. 5.

To place this data in context, it may be pointed out that between 1947 and 1962 the Consumers Price Index rose 35.5 per cent for all items. For food there was a 27.4 per cent increase. According to the data in Table 5, the retail price of whiskey rose some 9.8 per cent since the introduction of the index in 1953.

16. U. S. Treasury, Alcohol and Tobacco Tax Division.

**TABLE 5**  
**Selected Measures of Price Changes, Distilled Spirits Industry,**  
**1947-1962**

1	2	3	4	5	6	7	8	9
Year	Wholesale Price Index Bottld. in Bond 1957-9 =100	Price of Sea- gram 7 Crown to Penn- syl- vania	Retail Price Index Whiskey 1957-9 =100	Index of Price Offerings in Penn- syl- vania 1957-9 =100	Index of Prices of 10 Best Sell- ers, Penn- syl- vania 1957-9 =100	Price of Sea- gram 7 Crown Penn- syl- vania (Retail)	Wholesale Price Index Strts. 1957-9 =100	Wholesale Price Index Spirit Blends 1957-9 =100
1947 ...	125.3	\$29.40	—	83.7	85.7	\$4.01	153.0	93.6
1948 ...	125.3	29.40	—	87.2	86.1	4.03	162.0	93.6
1949 ...	125.3	29.40	—	86.3	83.2	4.03	146.5	93.6
1950 ...	125.3	29.40	—	86.6	86.6	4.03	122.5	93.6
1951 ...	125.3	32.75	—	95.5	96.2	4.46	117.2	93.7
1952 ...	125.3	32.75	—	94.4	97.3	4.46	117.2	94.4
1953 ...	112.8	32.75	94.1	95.5	97.5	4.46	117.2	94.4
1954 ...	101.1	32.75	94.5	96.2	98.0	4.46	104.3	94.4
1955 ...	100.0	32.75	95.1	97.1	98.2	4.46	101.2	94.5
1956 ...	100.0	32.75	96.0	98.4	98.4	4.46	102.0	94.5
1957 ...	100.0	32.95	99.4	99.5	100.4	4.57	102.0	99.7
1958 ...	100.0	32.95	99.6	100.0	99.5	4.57	98.8	100.2
1959 ...	100.0	32.95	100.9	100.4	100.2	4.58	99.3	100.2
1960 ...	100.0	32.95	102.4	103.8	104.2	4.77	99.7	100.2
1961 ...	100.0	32.95	103.0	103.8	104.2	4.74	99.7	100.2
1962 ...	100.0	32.95	103.3	105.1	103.8	4.74	99.7	100.2

Sources: Columns 2, 4, 8, and 9: U. S. Bureau of Labor Statistics

7: Annual Statistical Reports of Pennsylvania  
Liquor Control Board

5 and 6: Calculated by Author from Annual Statistical  
Reports of Pennsylvania Liquor Control  
Board.

3(1947-1956): Estimated by author.

3(1957-1962): Information supplied to Moreland Commission.

Averages, unfortunately, hide many things. After World War II, consumers generally purchased the most readily available whisky, the neutral blend. Distillers had bottled and marketed this product as a way of overcoming the shortage of aged whiskies which had resulted from the production hiatus during World War II. Before that war, neutral blends accounted for less than 40 per cent of the whisky market.<sup>17</sup> By 1946, this figure had increased to 87.9 per

17. Distilled Spirits Institute, *Distilled Spirits Annual Statistical Report*, 1962, p. 27.

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cent.<sup>18</sup> As aged whiskies became available, consumers shifted slowly but steadily away from neutral blends,<sup>19</sup> as the next table shows:

**TABLE 6**  
Spirit Blends Bottled as Per Cent of Total Whisky Bottled,  
1947-1962

Year	Total Whisky Bottled (million Wine gallons)	Spirit Blends Bottled	Spirit Blends as Per Cent of Total
1947 .....	157.3	135.9	86.4%
1952 .....	136.4	92.1	67.5
1957 .....	134.6	69.6	51.7
1962 .....	150.5	73.2	48.6

Source: Distilled Spirits Institute, *Distilled Spirits Annual Statistical Review*, 1962, p. 27.

The shrinking market for neutral blends and relatively stable market for American whisky in general should have lowered the prices of neutral blends. Yet, viewing the leading neutral blend brands of the major distillers for the years 1947 to 1962, it would seem that prices at retail or at the distillery have not reflected this pressure.

**TABLE 7**  
Fifth Prices, Leading Distillers'  
Spirit Blends, Pennsylvania, 1947-1962

	Seagram's 7 Crown	Shenley Reserve	National Bollings Pt. Choice	Hiram Walker GW 7 Star
1947 .....	4.01	4.01	4.27	—
1948 .....	4.03	4.01	4.00	—
1949 .....	4.03	4.02	4.00	—
1950 .....	4.03	4.02	4.00	4.04
1951 .....	4.46	4.45	4.43	4.49
1952 .....	4.46	4.45	4.43	4.48
1953 .....	4.46	4.45	4.43	4.48
1954 .....	4.46	4.45	4.43	4.48
1955 .....	4.46	4.45	4.43	4.48
1956 .....	4.46	4.45	4.43	4.48
1957 .....	4.57	4.56	4.57	4.59
1958 .....	4.57	4.56	4.57	4.59
1959 .....	4.58	4.56	4.57	4.59
1960 .....	4.77	4.75	4.75	4.77
1961 .....	4.74	4.74	4.75	4.77
1962 .....	4.74	4.74	4.75	4.77

Source: Annual Reports of the Pennsylvania Liquor Control Board.

18. *Ibid.*

19. Since the distilled spirits market is in a sense a custom market, data for bottled spirits reflect closely consumer purchases.

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Wholesalers and retailers are willing for the most part to limit price competition to the distillers. They have been in the forefront of the drive in this nation for the enactment of resale price maintenance laws. The Federal Trade Commission grants them a place second only to druggists in this endeavor. Retailers through their associations have threatened boycotts and have engaged in boycotts in an effort to have distillers fair-trade their liquors wherever possible. Once brands are fair-traded, distributors urge distillers to allow larger and larger margins for them.<sup>20</sup>

Some distillers are lukewarm to fair-trade, others support it by word and deed.<sup>21</sup> Seagram, for example, has tended to be one of the staunchest supporters of resale price maintenance. It has issued such pro-fair-trade pamphlets as *Seagram Puts it in Writing* and *Your Stake in Fair Trade* aimed at convincing wholesalers and retailers of the community of interest in resale price maintenance. In each, the company is pledged to a vigorous enforcement program on behalf of its brands.

Before leaving the price issue, it should be noted that the stability that distillers desire and attempt to maintain results also in price matching. The major distillers market a full line of distilled spirits in price "lines."<sup>22</sup> Consumers seldom find any price advantage in choosing one distiller's product over another within the price line.<sup>23</sup> Those outside of the Big Four do maintain a differential in many cases,<sup>24</sup> but they do so to overcome the brand consciousness of the average consumer. Because of the use of holding companies by distillers, consumers seldom know the parent company whose product they select.

Advertising, of course, is employed to enhance a brand's uniqueness, and in this, distiller advertising is not really different from that of any other industry. It also attempts to promote sales, to create consumer loyalty for a brand or distiller, and to create a product image which will result in the consumer's paying a price for the product which will more than reimburse the distiller for the advertising.

20. Federal Trade Commission, *Report on Resale Price Maintenance* (1945), Chapter 8.

21. *Ibid.*

22. *Beverage Media*, August, 1963, passim and *The Liquor Handbook* 1963, pp. 174-210.

23. Harold L. Wattel, *op. cit.*, Chapter 4.

24. *Beverage Media*, August, 1963, passim.

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If it is successful, it presents a barrier to the entry of the new firm which does not have the resources to carry on a major advertising campaign.

### 3. Costs and Capacity

Cost movements are difficult to judge because there is little published information about them. The Census of Manufacturers for 1954 indicates that payroll and material costs constituted about 63 per cent of the value of shipments, and for 1958 indicates a similar percentage. Apparently, the industry was not subject to inflationary cost increases that it was not able to recoup in one way or another. But there have not been important price increases in the industry; one may reason, then, that costs have not risen significantly in the industry. In the period around 1952-1953, a 100° gallon of spirits cost between \$1.00 and \$1.25 to produce; when aged, bottled, promoted, and marketed, the costs of the gallon ran to about \$3.10.<sup>25</sup> Whether these costs were excessive is difficult to say. The industry is composed of a variety of plants; some produce spirits in the most efficient methods possible, others take pride in "old-fashioned" costly methods. During World War II, spirits were purchased by the federal government at prices ranging from \$0.48 to \$1.46 per 190° gallon.<sup>26</sup> Costs of production of three large distillers ran from \$0.69 to \$1.36.<sup>27</sup> It is probably correct to assume as wide a variability in costs of whisky production today. But this is a consumer oriented industry where tastes, custom and status tend to play an important part in shaping prices rather than costs.<sup>28</sup>

Excess capacity is another matter. The industry has been plagued with excess capacity throughout the post-war period, although production has been on the rise in recent years. In 1944 and 1945, the industry produced more than 1.1 billion proof gallons of distilled spirits and whisky; a post-war record was set in 1951 with 846 million proof gallons of spirits and whisky. In fiscal year 1962, only 810 million proof gallons were produced, four per cent below the 1951 peak and 31 per cent below the 1945 post-repeal peak.<sup>29</sup> In 1952, only 522 million gallons were produced, far below the industry's

25. Harold L. Wattel, *op. cit.*, pp. 486-504.

26. *Ibid.*, p. 491.

27. *Ibid.*

28. Harold L. Wattel, *op. cit.*, Chs. 4-6.

29. U. S. Treasury, *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, Publication 67 (1962), p. 23.

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potential. Apparently, the industry has been able to live with its excess capacity. Perhaps more troublesome have been inventories. Inventories of distilled spirits at one time had to be tax paid after eight years and represented a threat to the profitability of any firm that had aged whiskies which could not be absorbed by the market. Around 1950 and 1951, these mounted to perilous heights, over one billion gallons; these were drawn down persistently until 1957, when they were permitted to mount again. In 1959, Congress extended the eight year rule to 20. Inventories again stand at the one billion gallon level. The largest portion of the present inventory produced in any one year is attributable to 1960. With the many variables operative, it is not easy to discern the impact of inventories and excess capacity on the industry. It is true, nevertheless, that in the early 1950's, holders of large inventories, Schenley and National, had lower profit margins than usual.

#### 4. Brand Choice

Consumers of distilled spirits are not handicapped by a dearth of choice. Their problem is inadequate preparation for the plethora of products they meet in the market. Not only does each major distiller maintain a full line of distilled spirit types, but each markets products in most of the price lines which exist for those types. In addition, subsidiaries also market a variety of types and brands. The information that follows substantiates this point.

**TABLE 8**  
Number of Brands of Whisky Types, and Price Ranges,  
Pennsylvania, 1947 and 1962

	1947			1962		
	Number of Brands	Low (fifth prices)	High (fifth prices)	Number of Brands	Low (fifth prices)	High (fifth prices)
Bourbon B. in B. ....	15	\$4.23	\$7.30	19	\$4.50	\$8.70
St. Bourbon .....	13	3.63	6.03	50	3.75	8.99
St. Rye .....	3	3.71	5.93	7	4.00	4.75
St. Corn .....	6	2.90	3.73	1	4.11	4.11
St. Whisky .....	—	—	—	1	4.00	4.00
Whisky .....	—	—	—	5	4.72	7.49
Blend of St. Whisky ...	8	4.18	6.57	4	4.61	5.19
Blended Whisky .....	107	3.00	4.53	59	3.50	5.46
Blended Scotch Type ...	5	2.50	4.68	1	4.55	4.55
Canadian .....	6	5.59	5.99	10	4.78	6.78
Irish .....	4	5.69	7.54	2	6.44	8.09
Scotch .....	42	5.90	8.25	45	5.30	16.61
Young Whisky .....	9	3.00	3.74	—	—	—

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It would be surprising if consumers wended a rational way through this forest of competing types and brands. While "*de gustibus non est disputandum*," it is also probably true that palates are not designed to differentiate between the subtle differences that exist between many of these brands.



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### III. RESALE PRICE MAINTENANCE

Resale price maintenance " \* \* is a system of pricing a trade-marked, branded or otherwise identified product for resale in which, pursuant to laws legalizing such arrangements, the manufacturer, producer or brand owner, or his authorized agent, factor or wholesale distributor, prescribes by contract the minimum price of the resale price at which such product may be sold at wholesale, and the producer or manufacturer and his factors or wholesalers prescribe the minimum price or the resale price at which such a product may be sold at retail, in the specified State, or in a specified portion thereof, with the effect of legally binding all other distributors in the specified area to conform to such prices."<sup>30</sup> In effect, resale price maintenance is a system of vertical price fixing. In the United States, this type of price fixing has been specifically exempted from the Sherman Antitrust Act and the Federal Trade Commission Act by the Miller-Tydings Act of 1937. This enabling amendment permitted the various states to enact resale price maintenance laws sanctioning fair-trade within their borders.

The law and the practices to which it has given rise have been subject to legal controversy since its inception. Landmarks in the legislative-judicial history of resale price maintenance include the *Old Dearborn Distributing Company v. Seagram Distillers Corporation*, 299 U. S. 183 (1936),<sup>31</sup> *Sunbeam Corporation v. Wentling*, 185 F. 2d 903 (1950),<sup>32</sup> *Schwegmann Brothers v. Calvert Distillers Corporation*, 341 U. S. 384 (1951),<sup>33</sup> the McGuire Act, 15 U.S.C. 45 (1952),<sup>34</sup> and *General Electric Co. v. Masters Mailorder Co. of Washington, D. C., Inc.*, 122 F. Supp. 797 (D. C. N. Y., 1957).<sup>35</sup>

The law of resale price maintenance is not easily summarized. As of 1962, 22 states had fair trade laws including provisions for

30. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), pp. xxvi-xxvii.

31. Sanctioned state enacted resale price maintenance laws.

32. Upheld right of seller within one state to sell below fair-traded price to out-of-state buyers.

33. Invalidated use of "nonsigner" clauses in resale price maintenance contracts. Note: A nonsigner clause when legal binds distributors who have not specifically contracted to observe minimum established prices to do so. The National Wholesale Druggists maintain that the nonsigner clause is the only practical method of enforcing resale price maintenance contracts. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade*, Third Edition, March, 1955, Foreword.

34. Sanctioned use of nonsigner clauses in resale price maintenance contracts.

35. Permitted a reseller in a non-fair-trade state to sell fair-traded items in fair-trade state at any price.

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the use of the nonsigner clause, 19 states had fair trade laws but the nonsigner clause was not sanctioned, and 8 states either had no fair trade laws or the laws had been declared illegal.<sup>36</sup> There is no federal resale price maintenance law, although there have been repeated attempts to secure such legislation. The most recent attempts have come under the guise of bills purportedly interested in stabilizing product quality.<sup>37</sup>

In 1935, New York enacted a general fair trade law which authorizes brand owners to fix resale prices and bring private law suits against willful violators (General Business Law, Art. 24-a, Laws 1935). This law, popularly known as the Feld-Crawford Act still applies to products other than alcoholic beverages. As to liquor or wine, however, since 1950, section 101-c of the A.B.C. Law has required brand owners to file minimum consumer resale prices with the S.L.A.; and has prohibited package store licensees, on pain of suspension or revocation of their licenses to sell liquor or wine for less than the minimum consumer resale price filed by the brand owner.

The pressure for resale price maintenance laws has come primarily from retail groups, small drug and liquor retailers in particular. This is not to imply that manufacturers are not interested in resale price maintenance. Some are strong advocates of fair-trade while others who are lukewarm support it under pressure applied by distributors. Nevertheless, small retailers are more interested in the high markups sanctioned by resale price maintenance as a basis for profits than are manufacturers who are more disposed to look to larger volume as a source of profits.<sup>38</sup>

Economists have repeatedly and at great length analyzed the effect of resale price maintenance on the economy.<sup>39</sup> All emphasize

36. Committee on Interstate and Foreign Commerce, 88th Congress, 1st Session, *Hearings on HR 3669, April-May, 1963*, p. 81, hereafter referred to as CIFIC, 1963 *Hearings on Quality Stabilization*.

37. *Ibid.* and CIFIC, 87th Congress, 2nd Session, *Hearings on H.J. Res. 636, 637, 639, and H. R. 10335, 10340, 10517, 11227, 11346, and 11778*. The latter will hereafter be referred to as CIFIC, 1962 *Hearings on Quality and Price Stabilization*.

38. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), pp. LIV ff.

39. See E. T. Grether, *Price Control Under Fair Trade Legislation* (1939). Recent texts with good discussions include Vernon A. Mund, *Government and Business*, 3rd Edition (1960); and Leonard W. Weiss, *Economics and American Industry*. In addition there have been many articles on the problem. The structure of the next section is suggested by the Mund volume.

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the effects of fair-trade on: 1. the level of prices, 2. protection of brand names, 3. trade practices, 4. productive efficiency, and 5. competition. A summary of arguments for and against resale price maintenance follows. The reader interested in any of these as presented by the participants is referred to the many federal hearings on resale price maintenance and quality stabilization."

### A. Arguments for Fair-Trade

#### 1. Effect on Prices

Resale price maintenance is designed to foster prices which provide adequate margins at all distribution levels and which remain fairly stable through time. Proponents claim that extremely low and extremely high prices disappear with the advent of resale price maintenance. Survey data are submitted which show that specific branded products in particular markets covered by resale price maintenance rose less in the postwar inflation than did those same branded products in open markets; in some instances, advocates report, fair-traded products were actually priced below the same branded products in the open market. Storewide margins under fair-trade are held to be the same or below those stores not operating under resale price maintenance.<sup>41</sup>

40. CIFIC, *Hearings on Fair Trade 1958, Quality and Price Stabilization 1962 and Quality Stabilization 1963*.

41. One of the more complete cases including much of the statistical evidence favorable to the fair-trade case was made by Maurice Mermey, Director of the Bureau for the Advancement of Independent Retailing (formerly the Bureau of Education on Fair Trade). See CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, pp. 144-170. His statistical evidence includes the following studies:

McKesson & Robbins (1939-47) Drugs and toiletries:

Prices increased 24.8 per cent in fair-trade area in period against 41.2 per cent for products in non-fair-trade area. (p. 153)

A. C. Nielson & Co. (1949, 1951, and 1958) Name brand drugs:

"... the weighted average prices in the non-fair-trade area were not lower than those in the fair-trade area..." (p. 154)

Department of Labor (1947-1958) Consumer Price Index:

"... prescriptions and drugs (usually fair traded items wherever possible) increased less than the general price level of other items in the medical care basket." (p. 155)

Ostlund-Vicklund Study (1930's) Drugs:

"... the advent of fair trade in the United States did not increase the retail prices of leading drugstore products." (p. 155)

National Association of Chain Drug Stores (1939-1947) Drugs:

"... fair traded drugstore products held the price line better than non-

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As applied to the sale of liquor, it is specially argued that minimum resale prices discourage excessive consumption. Thus, even if fair trade keeps prices high, its proponents in the liquor industry argue that high prices are a socially beneficial curb on consumption.

## 2. Brand Name Protection

Many of the pricing practices held inimical to small business, according to them, involve the "misuse" of established branded merchandise to attract customers. Producers maintain that when their products are "footballed," that is, subject to "excessive" competitive

fair-traded drugstore products and very much better than prices generally." (p. 155)

Salt Lake Hardware Co., Salt Lake City, Utah (1942-1960) Hardware:

"... almost 90 percent of such items (hardware) are not fair traded at the wholesale level; yet they show a slightly higher percentage of price increase, 1959 over 1948, than the remaining items which have been fair traded at the wholesale level." (p. 157)

Union Underwear Co., Inc. (1948-1958) Underwear:

Only one price increase in period for list of eight. In list of eight items sold by company there was only one price increase, three price decreases and two prices remained unchanged. Purpose: to show price stability of fair trade items. (p. 158)

Corning Glass Works (1948-1959) Glassware:

This company reported a price increase of 23.8 per cent for a list of 26 items it usually fair-trades. Purpose: to show price stability. (p. 158)

McGraw-Edison Co. (1947-1959) Toasters:

"It is apparent in looking at the pricing trend of the 1B14 toaster that, during the fair trade years of 1949 through 1957, this toaster was slightly increased in price and then reduced—with the result that it is evident the prices of this toaster did not increase while it was fair traded. However, when fair trade was removed in February 1958 the prices on this toaster moved forward—and I believe that this has been typical of the prices on many other competitive electric housewares." (p. 159)

Parker Pen Co. (1949-1958) Fountain Pens:

Price data submitted for period 1949-1958 indicated that for six models of pens there were one increase, three no changes, and two decreases in the period. Purpose: to show price stability. (p. 159)

A critical review of fair-trade price surveys is found in Marvin Frankel's *"The Effect of Fair Trade: Fact and Fiction in the Statistical Findings,"* Journal of Business, July, 1955, pp. 182-194. The Ostlund and Vicklund Study, for example, is one that comes under fire.

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pricing at the retail level, some retailers will give up the line and consumers will lose confidence in the quality of the product.<sup>42</sup>

### 3. Trade Practices

Small independent retailers need protection against unfair practices of larger diversified retailers, it is contended. The latter businesses, it is held, are known to engage in trade practices inimical to the small businessman, such as loss-leader selling, bait advertising, and predatory price cutting. Independent businessmen who attempt to match these practices find, according to their spokesmen, that their markup and profits disappear.<sup>43</sup>

### 4. Effect on Productive Efficiency

Here the proponents' case rests on the stability that arises out of successfully applied fair-trade. The orderliness, in a sense, is defined in terms of maintaining the classic pattern of distribution with adequate markups at all levels of trade so that at least the present business population may not decline. Profit margins, however, would not be set so high as to allow any increase in inefficiency since there would always be pressure from cross product competition to maintain efficiency. Another element in this case is that resale price maintenance laws in maintaining the classic pattern of distribution prevent concentration in distribution.<sup>44</sup>

42. In a letter to the Committee holding hearings on Quality and Price Stabilization in 1962, the vice president of P. H. Hanes Knitting Co. reported on the experience of his company.

"In November of 1947, one of the leading Fifth Avenue stores cut their prices on these garments (sleeping garments for children) to substantially below the nationally advertised price. Other stores in competition with it felt impelled to meet this store's price, and threatened to drop our brand completely. In fact, a number of them did drop our line and replaced it with other brands.

\* \* \*

"Over the intervening years we have gradually won back most of the outlets that had dropped our brand because 'Hanes' was competing with 'Hanes' from store to store. The damage to our brand name had run so deep, however, that two outlets declined to restore our brand into their stores until 1961, 14 years after the uneconomic price war. In the interim consumers could not purchase our excellent values from these stores." (CIFIC, *Hearings on Quality and Price Stabilization*, June 1962, p. 423.)

43. Typical testimony in this regard may be found in CIFIC, *Hearings on Fair Trade*, April-May, 1958, p. 97.
44. The Retail Jewelers of America testified that, "... unless we take steps to give some degree of protection to small individual retailers, we are going to have power of retail distribution so concentrated in this country that we will have effective monopolies such as ... in certain South American countries." CIFIC, *Hearings on Quality and Price Stabilization*, June, 1962, p. 222, and, *Ibid.*, pp. 25 and 110.

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## 5. Impact on Competition

Proponents maintain that competition is not impaired by fair-trade laws. They contend that price competition continues between manufacturers for branded items and further that branded products continue to be price competitive with private label products. The level of prices, it is asserted, has to be sufficiently low to assure general consumer acceptance of branded merchandise.<sup>45</sup>

### B. *The Case Against Resale Price Maintenance*

#### 1. Effect on Prices

Despite the many conflicting surveys through which economists have had to thread their way, they conclude that prices in populous fair-trade areas of branded merchandise are higher than in similar areas outside the reach of resale price maintenance. Most economists agree that oligopoly breeds stable prices. Hence, it may actually be true that prices of fair-traded products have increased less in the post-war inflation than non-fair traded products. It may also be true that prices of fair-traded products in areas with resale price maintenance laws increased less than those same products in areas not covered by such laws. However, increasing prices presumably have a function in a private enterprise economy: they are relied upon to provide growing profits to attract new producers to a field and to encourage producers to expand their output. In this way, the economy adjusts to shortages of goods, and any interference with independent decisions of businessmen which bring about such adjustments has serious social costs.

The interest of retailers and wholesalers in resale price maintenance is not limited to their willingness to help manufacturers maintain a brand-price identity. They have an important interest in the level of prices existing at their trade levels. A large markup provides a profitable operation at a lower volume than would a low markup. Price uniformity throughout a level of trade also tends to freeze the structure of distribution at that trade level. Wholesalers and retailers protest that resale price maintenance does not result in a price level higher than would exist without it. If this were so, their support for resale price is clearly illogical.<sup>46</sup>

45. Representative statements on these points are found in CIFIC, *Hearings on Quality Stabilization*, 1963, p. 168 and 111 and CIFIC, *Hearings on Quality and Price Stabilization*, 1962, p. 18.

46. Vernon Mund, *op. cit.*, p. 421.



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Much evidence has been introduced through the years to show that prices under resale price maintenance are higher and more stable than those without such protection.<sup>47</sup> In the matter of price stability, both sides agree.

## 2. Protection of Brand Names

The nation's laws provide the manufacturer with protection against infringement, or fraudulent use of his trademark. Should the brand owner receive additional protection in the private market? There is no justification for it, say the opponents of resale price maintenance.

It is true that branded merchandise retailed at low profit margins may be discontinued by high profit margin stores. The manufacturer is then faced with a distribution decision. One can hardly argue, they hold, that this is the type of decision he should not face. The quality of the manufacturer's product coupled with its price should be the factors that determine the degree of consumer acceptance he obtains for it.<sup>48</sup>

47. *Federal Trade Commission Report on Resale Price Maintenance*, passim, and CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, contain a great deal of this type of evidence. In the latter, a study by the Justice Department is found on pp. 234-5. Examples from the drug field are found on pp. 264-70 and in the CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, on pages 211-21.

48. In this context one witness offered the following:

"The majority of manufacturers in the United States are opposed to fixing of prices for brokers, distributors, wholesalers, and retailers. Many of the manufacturers' representatives have indicated that they would prefer not to have to enforce a price for these distributive levels and it has been more or less proven that when fair trade or price fixing by manufacturers was enforceable in 45 States only 10 percent of the Nation's retail sales volume was price fixed. Therefore, by volume, 90 percent of brokers, distributors, wholesalers, and retailers determined their own prices as indicative by economic necessity. Fixing of distributive prices by manufacturers is not necessary for protection of trademarks. Free competitive pricing, not price fixing, creates greater volume.

"In that paragraph we mention Libby, Carnation, Kellogg, Del Monte and many other famous brands which have never been price fixed by the manufacturer in the distributive system.

"The aforementioned famous brands refute other allegations in the quality stabilization bill that manufacturers price fixing is desirable. It is our opinion that these brands compete in esteem with any brands in the marketplace and they have never been protected by any price maintenance." *Ibid.*, pp. 270-1.



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### 3. Unfair Practices

Certain practices are undoubtedly inimical to the profits of other retailers and to other manufacturers. These include sales by manufacturers to retailers at prices which "discriminate" on the basis of geography, of order size, etc. (The term "discriminate" as used here implies the charging of different prices to various buyers for the same goods without a corresponding difference in quality, service, or terms of sale.)<sup>49</sup> Some retail trade practices also are inimical to other retailers and perhaps to manufacturers. These include sales of merchandise at prices which do not cover invoice costs plus minimum operating costs of efficient retailers for the purpose of driving competitors from the market. Another is loss-leader selling whereby a retailer sporadically prices a popular item below invoice costs plus minimum operating costs of efficient retailers for the purpose of expanding his market. This latter type of pricing (loss-leader selling), if it is concentrated consistently on a specific branded item, may cause competing retailers to drop that item and thereby foreclose certain outlets to the manufacturer. Another type of price cutting is the reduction of customary markups at retail. Marketing efficiencies may allow profitable markups which fall below those set by the manufacturer. Sporadic loss leader selling and the use of lower but profitable mark-ups can hardly be classed as "unfair." Since they reflect pricing decisions by those closest to the level of trade for which they apply, they can only be considered healthy for a private enterprise system.

Price cutting which is continuous and results in prices which do not cover invoice and operating costs of efficient retailers may be considered "unfair." The question remains whether it is desirable to grant to manufacturers, who are private individuals, the legislative right to conspire to fix prices vertically. There are remedies which are less sweeping and oppressive.

"Bait" and misleading advertising are retail practices usually cited as justifying resale price maintenance laws. These, too, may harm retailers and manufacturers, but, say opponents of fair-trade, they should and can be dealt with through other types of legislation and administrative arrangements, such as prohibition of sale below cost.

The independent retailer should not be deprived of his right to determine his own margins and prices. It should also be remembered

49. Vernon Mund, *op. cit.*, p. 138.

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that resale price maintenance laws, especially mandatory laws, usually bring with them increased governmental activity in the private market.<sup>50</sup>

#### 4. Productive Efficiency

Proponents of resale price maintenance tend to focus on two sets of businesses: producers with high priced branded merchandise and small retailers. Their case ignores the possibility that the manufacturer may not know the best markup policies for all levels of trade; further, they ignore a basic tenet of the American private enterprise system, namely, that profits are to be a reward for innovational efficiency. Some retailers are more efficient than others; the more efficient may wish to pass along cost savings to their customers and consequently enlarge their markets. Under resale price maintenance, they cannot do so. Inefficient and high cost distributors are permitted to stay in business. This results in a poor allocation of resources within the economy and shifts income from consumers to businessmen who do not merit it.<sup>51</sup>

#### 5. Maintenance of Competition

Opponents of resale price maintenance say that it reduces the number of pricing decisions in the economy by allowing the manufacturer to establish prices vertically through all levels of trade and, in a very real sense, horizontally through the distribution levels. Wholesalers and retailers of price-fixed merchandise, then, cannot compete with one another on the basis of price.

To those skeptics who reply that if price competition is desired, it remains at the manufacturing level, producer versus producer, the answer must be that, unfortunately, too many of America's manufacturing industries are oligopolies, that is, dominated by a few firms responsible for the bulk of the output and employment in the industry. Those firms recognizing a community of interest tend to avoid price competition in favor of nonprice competition. The end result is price stability at some high level which does not reflect the varying efficiencies of businessmen.<sup>52</sup>

50. See, CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, pp. 232-3 for an example of testimony on these points.

51. See, CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, pp. 382-3.

52. CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, p. 209 for representative testimony on these points.

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### C. *Conclusions About General Resale Price Maintenance*

Many economists recommend that resale price legislation be repealed. They are joined in this conclusion by the Report of the Attorney General's National Committee to Study the Antitrust Laws<sup>53</sup> and British Board of Trade.<sup>54</sup>

These conclusions rest on evidence which suggests that resale price maintenance leads to generally higher prices, a dampening of retail and wholesale efficiency, excessive distribution capacity, a high level of costly competitive devices, a costly system of price policing, an increase in the importance of private label merchandise, and lower levels of output and employment than are possible without it.

The next section of this paper considers the effect of resale price maintenance in the liquor industry.

53. *Report of the Attorney General's National Committee to Study the Antitrust Laws*, March 31, 1955, p. 154.

54. British Board of Trade, *Report of the Committee on Resale Price Maintenance*, June, 1949 (Cmd. 7696), pp. 33-4 and its *A Statement on Resale Price Maintenance*, June, 1951 (Cmd. 8274), p. 11.

## IV. FREE VERSUS FAIR-TRADE IN DISTILLED SPIRITS

Resale price maintenance works best for products which are highly advertised, nonperishable, widely distributed, relatively low priced, and not highly stylized or seasonal.<sup>55</sup> The effectiveness of fair-trade is enhanced when " . . . manufacturers of brands which are close substitutes collectively desire to maintain resale prices and . . . organized retailers of the few leading brands, which account for most of the business, cooperate in establishing and policing resale price arrangements."<sup>56</sup> Distilled spirits and the distilled spirits industry respectively, seem to meet these tests.

Distilled spirits are highly advertised. Distillers spent more than \$100 million for advertising in the major media in 1962, approximately one half of the total for all alcoholic beverages.<sup>57</sup> This sum represented 1.72 per cent of consumer expenditures for distilled spirits or some 40 cents per gallon of distilled spirits consumed.<sup>58</sup>

Distilled spirits are nonperishable. When bottled, distilled spirits will last indefinitely. When aging in barrels the quality is subject to change but the consumer is accustomed to equating the aged product with quality.<sup>59</sup> On the other hand, the distiller is not permitted to age his products beyond 20 years without payment of the federal tax. The distiller is faced also with the problem of evaporation during aging. At the moment the last two factors are not considered troublesome by the industry.

The "fifth" of distilled spirits can be considered relatively low priced and hence a prime subject for resale price maintenance. A "case" sale, of course, represents an outlay of some \$50 or more and may be subject to "discounting." Voluntary<sup>60</sup> resale price maintenance tends to break down faster than mandatory<sup>61</sup> resale price

55. Vernon Mund, *op. cit.*, p. 411.

56. *Ibid.*, p. 412.

57. *The Liquor Handbook*, 1962, pp. 174-210.

58. Calculated by author.

59. The relationship between aging and "quality" of whisky is not well established. At least one major distiller has gone on record that American whisky deteriorates in quality after four to six years in the barrel. For a lengthier discussion see Harold L. Wattel, *The Whisky Industry*, unpublished doctoral dissertation, New School, pp. 20-26, 35-36, and 202-343.

60. Minimum prices established by manufacturer for all trade levels and policed by him.

61. Minimum prices established by manufacturer for all trade levels but policed by the State.

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maintenance; nevertheless there is price shading even under the latter scheme.<sup>62</sup>

There are seasonal variations in the consumption of distilled spirits by types but bottled spirits held from one season to the next would not affect consumer choice even if he were able to detect this.

Many distillers allege that they are strong supporters of resale price maintenance for their products and wholesale and retail liquor dealers are on record in support of this type of price control for the products they sell. Since price cutting under resale price maintenance does occur it means that some businessmen at one or all of the trade levels seek a market advantage by deviating from the suggested prices of the distiller. To the extent that some states are willing to cooperate with the industry to police the minimum prices, the efficacy of resale price maintenance is enhanced. In few fields outside of liquor does one find this type of industry-government cooperation to maintain prices.<sup>63</sup> It is not by chance that many of the significant judicial decisions on resale price maintenance have resulted from litigation involving distillers.<sup>64</sup> In 1945, the Federal Trade Commission concluded that, "While the operation of Federal and State fair-trade laws has not proved as successful in the liquor business as had been hoped by its proponents, they have undoubtedly, had considerable restraining influence on price competition within the liquor industry."<sup>65</sup>

New York State has had mandatory resale price maintenance for liquors since April 15, 1950. Under it, brand owners must list minimum prices with the State Liquor Authority which the latter polices. Manufacturers, wholesalers, and retailers pay a fee to defray the expenses of administering the regulation. Violators are subject to penalties ranging from license suspension to license revocation.<sup>66</sup> See Table 9 for a record of the fees collected and penalties meted out since the law's inception.

62. See Table 9 for a list of violations of minimum resale provisions of New York State law.

63. There are analogous situations in farm products.

64. See, e.g., *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U. S. 183 (1936), *Schwegmann Bros., et al. v. Calvert Distillers Corporation*, 341 U. S. 384 (1951), and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1949).

65. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), p. 406.

66. Laws of New York, Chapter 689, Section 101-C.

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TABLE 9

Fees Collected, Price Schedule Posting\* and Minimum Consumer Resale Price Posting\*\* and Penalties Imposed for Violations of Minimum Resale Price Regulations,† New York State, 1950-1961

Year	Price Schedule Listing Fees		Minimum Consumer Retail Price Listing Fees		Violations of Minimum Consumer Regulations for which Licenses were Revoked, Cancelled or Suspended	
	Number	Amount	Number	Amount	Notice of Violation Only	
1950	.... 365	\$74,600	6,995	\$89,450	4	147
1951	.... 348	72,250	5,253	67,990	31	314
1952	.... 336	70,250	5,246	67,400	9	244
1953	.... 323	69,250	5,212	66,530	10	190
1954	.... 330	70,300	5,256	67,270	12	139
1955	.... 305	65,950	5,190	65,540	14	94
1956	.... 300	65,550	5,204	65,860	11	68
1957	.... 305	67,700	5,118	64,870	15	34
1958	.... 290	66,250	5,172	64,790	15	29
1959	.... 291	67,550	5,183	64,450	30	32
1960	.... 275	65,350	5,100	63,440	13	32
1961	.... 277	65,450	5,118	63,700	19	11

\* To be filed by manufacturers and wholesalers pursuant to section 101-b of the Alcoholic Beverage Control Law. The stated purpose of the section is to promote temperance by eliminating price discrimination.

\*\* To be filed by manufacturers and wholesalers pursuant to section 101-c of the Alcoholic Beverage Control Law. The stated purpose of the section is to promote temperance by eliminating price wars.

† Schedule of penalties for violation of minimum price regulations is found in section 101-c part 7 as follows:

First offense—not exceeding ten days suspension of license.

Second offense—not exceeding thirty days suspension of license.

Third offense—license may be suspended, cancelled or revoked.

In addition the penal sum of the bond filed by the licensee may be recovered by the Authority.

Source: Annual Reports of New York State Liquor Authority

At the present time the majority of liquor markets are subject to compulsory resale price maintenance. Of the 33 "license" subdivisions of the nation, 17 have compulsory resale price maintenance, while five have no fair-trade for liquors at all. Table 10 contains the information by state.



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TABLE 10

## Liquor Price Control Arrangements, License States, October, 1963

Compulsory Resale Price Maintenance	Voluntary Fair Trade With Non Signer Clause	Voluntary Fair Trade Without Non Signer Clause	No Fair Trade
Alaska	Arizona	Colorado	District of Columbia
Arkansas	Illinois	Florida	Kansas
California	Nevada	Louisiana	Missouri
Connecticut	North Dakota	South Carolina	Nebraska
Delaware	South Dakota		Texas
Georgia	Wisconsin		
Hawaii	Wyoming		
Indiana			
Kentucky			
Maryland			
Massachusetts			
Minnesota			
New Jersey			
New Mexico			
New York			
Rhode Island			
Tennessee			

Source: Staff of New York State Moreland Commission.

New York State has mandatory resale price maintenance. The policing of prices under resale price maintenance laws and the penalties which may be imposed are important aspects of these laws. When a manufacturer must police prices himself, he may have to engage a detective agency to gather evidence for litigation. If he wins his case, he may find that he is still unable to prevent the flow of his products to price offenders. If he secures an injunction, of course, the retailer is likely to comply with the court order.

When the state polices the pricing situation and is willing to revoke licenses of offending parties as in New York State, the manufacturer is almost guaranteed a "costless" type of price control. Private policing is a very costly enterprise." The more than \$120,000 New York State now collects for price listing fees is not inconsiderable. Further, the police power of the State is a deterrent in itself.

67. "Prior to February, 1958 when General Electric abandoned price-fixing fair trade the company proposed 3,000 alleged price-fixing violations in 5 years at a cost of a million dollars." CIFIC, *Hearings on Quality and Price Stabilization*, June, 1962, p. 273.



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Let us turn now to the effect of resale price maintenance on the liquor industry. The effect on the business population, competition, trade practices, brand names, and prices will be treated in that order.

### A. *The Changing Business Population*

A word about the business population in the distilled spirits industry is in order. First, the number of distillers in the nation decreased from 144 in 1947 to 88 by 1958.<sup>68</sup> A further reduction is suggested by the decline in production facilities operated between 1958 and 1962.<sup>69</sup>

The data for the number of wholesalers and retailers show conflicting trends with a decrease in the number of the former and increases in the number of the latter as Table 11 shows.

TABLE 11

Wholesale and Retail Establishments, United States, New York State and the District of Columbia, 1948 and 1958

	All Wholesalers		Off-Premise Retailers	
	1948	1958	1948	1958
United States .....	1,766*	1,739††	33,422	37,068
New York State .....	280**	200	4,391†††	4,151†††
District of Columbia .....	24†	15	334	356

\* Includes wholesalers in control states and 101 manufacturers' sales offices who also carried beer.

\*\* Includes 85 wholesalers who also carried beer.

† Includes 7 wholesalers who also carried beer.

†† Includes wholesalers in control states.

††† These data differ slightly from those of the New York State Liquor Authority. The retailer population has remained virtually stable as a result of the license moratorium.

Sources: U. S. Census of Business, 1948, *Wholesale Trade*, Vol. IV, passim.

U. S. Census of Business, 1958, *Wholesale Trade*, Vol. IV, passim.

U. S. Census of Business, 1948, *Retail Trade*, Vol. III, passim.

U. S. Census of Business, 1958, *Retail Trade*, Vol. I, passim.

Off-premise liquor retailers in the United States, New York State, and the District of Columbia had total sales of \$4,202.0 million,

68. 1958 *Census of Manufactures, Beverages*, MC58 (2)-20G, pp. 4-5.

69. From 1958 to 1962 the changes have been as follows: 193, 186, 178, 165, and 170. *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, p. 23.

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\$451.4 million, and \$97.7 million<sup>70</sup> and average sales of \$113.4 thousand, \$108.8 thousand, and \$274.3 thousand respectively in 1958. Average sales in New York State were below the national average and less than one half those of the District of Columbia retailer.

These findings suggest that the markup is higher in the New York store than the District of Columbia store. Evidence presented later also supports this, and this is in line with earlier findings which showed that package liquor stores in states with mandatory resale price maintenance had not only higher profits but higher costs, as well. These data are found in Table 12.

TABLE 12

Gross Margins, Total Expense, and Net Profit of Liquor Stores, 1950

	(Percentages)		
	Gross Margin	Total Expense	Net Profit
83 stores in states with state enforced liquor resale price maintenance .....	22.1%	18.2%	3.9%
34 stores in states with voluntary state enforced liquor resale price maintenance	20.5	17.7	2.8
68 stores with state general resale price maintenance law only .....	18.8	15.8	3.0
37 stores with no liquor price control or state Fair-Trade law .....	16.0	14.6	1.4

Source: Robert L. Tebeau, "Package Liquor Stores Operating Results in 1950," *Cost of Doing Business Survey Number 5*, Dun & Bradstreet, Inc.

Apparently, the more stringent the law and the better policed it is, the higher the accounting items—expenses, gross margins, and net profits—tend to be.

## B. Competition, Trade Practices, and Branded Distilled Spirits

The influence of resale price maintenance on the character of competition in liquors is best shown by comparing the District of Columbia market which has no fair-trade in liquors with the New York market that does.

### 1. The Consumer

The consumer of packaged liquor in New York State seldom sees retailer advertising which offers price reductions on name brands

70. 1958 Census of Business, Retail Trade, Vol. II, Pt. 1, pp. 1-6 and 9-5 and Vol. II, Pt. 2, pp. 32-5.

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of distilled spirits. He does, however, meet advertised prices and price reductions on private label products. In Washington, D. C., he meets both. A more intensive analysis of prices in the two markets is found in section 5 to follow.

The consumer may not bargain and obtain legal price reductions on quantity purchases of branded liquors although he may do so on unbranded products in New York State. In Washington, D. C., the consumer may bargain and obtain legal price reductions on quantity purchases of both branded and unbranded products. There are, of course, provisions for minor price reductions on branded liquors in the minimum prices stipulated by distillers in New York State.

Other sales promotion devices such as the issuance of stamps with purchases, the giving of novelties with purchases, and general advertising are limited in both markets.

## 2. The Retailer

The New York State retailer does not have the freedom to set his retail prices for branded liquors as does his Washington, D. C. counterpart. He may not even have complete freedom to set his price for his private label merchandise.<sup>71</sup> However, he is subject to price inducements on the part of the wholesaler and distiller to push particular brands of distilled spirits. The retailer with ample resources is able to inventory branded spirits in months of price cuts for sale at any time during the year. This device, cutting prices to the retailer without commensurate cuts to the consumer, has been growing in New York. For example, in August, 1950, there were four price reductions for 120 brands of blended (with neutral spirits) whiskies. In August, 1963, 23 of the 111 brands of blended whiskies scheduled price reductions. The effect of these reductions is to increase the retailers' margins.

The absolute and relative margins for a bottle of distilled spirits are then important pricing devices for stimulating *brand* sales but not total sales in New York State since the consumer usually does not see the price cut. In August, 1950, the bottler of *Baltimore Club*, a blended whiskey, advertised that it "Champions a 40% mark-up for you, Mr. Retailer"<sup>72</sup> at a time when the retailer was obtaining some 25 percent to 27 percent on his leading brands of whiskey.

71. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), p. 347.

72. *Beverage Media*, August, 1950, p. 5.

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Retailers have not obtained 40 percent mark-up they sought<sup>73</sup> but since the increase in the federal distilled spirits excise in 1951 they have increased their absolute and relative mark-ups even on leading brands. They now obtain approximately a 30 percent mark-up on their leading brands against approximately 27 percent in 1951.<sup>74</sup>

The retailer in Washington, D. C. presumably gets along on a smaller mark-up. The large volume store operates with a mark-up of approximately ten percent and the small volume store with something close to 20 percent.<sup>75</sup> Since price data are not published for the various trade levels these arrangements cannot be ascertained with great certainty. It is clear, however, that price competition at the retail level does filter back to the wholesaler and possibly the distiller. Or, and this is equally plausible, distillers may underwrite retail price competition.

For example, many retail prices in the District of Columbia are below the cost to New York State retailers.

TABLE 13

Retail Prices of Selected Distilled Spirits Brands, Washington, D. C.,  
Compared With Wholesale Prices of the Same Brands,  
New York State, September, 1963

Brand	(Fifths)	
	Washington, D. C. Retail Price	New York State Wholesale Price
P. M. (Blend) .....	\$2.85	\$3.45
Old Crow (Straight) .....	3.39	4.15
Gilbey's Gin .....	2.87	3.17
Haig and Haig (Scotch) .....	4.59	5.31
Seagram's V. O. (Canadian) ....	4.87	5.06

Sources: *Beverage Media*, August, 1963; *Washington Post*, September 4, 1963, and field survey by author.

Profitability, of course, is a function of margins, efficiency, and volume. Above it was noted that the Washington retailer had a

73. *Beverage Media*, August, 1950, p. 45. Headline of story reads: "Priority of Supply and 40% Mark-Up for New York Licensees Assured."
74. An example may suffice here. A fifth of Schenley Reserve cost the retailer \$3.19 in September, 1951, and he retailed it for \$4.05, a mark-up of 27.0 percent. In August, 1963, he paid \$3.82 and sold it for \$4.99, a mark-up of 30.6 percent.
75. From recent conversations with retailers and officials in Washington, D. C.